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REPORTS
OF
DECISIONS IN CRIMINAL CASES
MADE
AT TERM, AT CHAMBERS,
AND IN THE
COURTS OF OYER AND TERMINER
OF THE
STATE OF NEW-YORK.

0/14/28/21/

BY AMASA J. PARKER, LL. D.

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CRIMINAL CASES

IN THE

STATE OF NEW-YORK.

SUPREME COURT. Monroe General Term, March, 1855. *Johnson, Welles and T. R. Strong*, Justices.

THE PEOPLE *v.* JOSEPH WHEELOCK.

The word "beer," in its ordinary sense, denotes a beverage which is intoxicating, and is within the meaning of the words "strong and spiritous liquors," as used in the Revised Statutes.

Where the indictment charged the sale of "strong and spiritous liquors" without license, and, among other liquors, "one pint of strong beer," and the proof, without further explanation, was, that the defendant sold "Dutch beer," it was held that the variance was immaterial.

THIS case came before the court on return to a writ of *certiorari* to the Court of Sessions of Livingston county.

The indictment was as follows :

State of New-York, Livingston County, ss :

The jurors of the people of the State of New-York, and for the body of the county of Livingston, then and there being sworn and charged to inquire for the people of the said state and for the body of the said county of Livingston, on their oath present: That Joseph Wheelock, of the town of Leicester, in the county of Livingston, on the sixteenth day of January, in the year of our Lord one thousand eight

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hundred and fifty-four, and at divers other times between that day and the day of the finding of this inquisition, at the town of Leicester, in the said county of Livingston, did sell to divers individuals, to wit, Harmon Parish, Hiram Willis, Norman Green, Nelson Willis, and to divers other persons, strong and spiritous liquors in quantities less than five gallons, to wit, one pint of whiskey, one pint of rum, one pint of gin, one pint of brandy, one pint of wine and one pint of strong beer, to each of the above named individuals, without license therefor, contrary to the provisions of the ninth title of the twentieth chapter of the first part of the Revised Statutes of the State of New-York, and against the peace of the people of the State of New-York and their dignity. And the jurors aforesaid, on their oath aforesaid, do further present: That the said Joseph Wheelock, on the sixteenth day of January, in the year of our Lord one thousand eight hundred and fifty-four, and at divers other times between that day and the finding of this inquisition, at the town of Leicester, in the said county of Livingston, did sell to certain individuals, to wit, to Harmon Parish, Hiram Willis, Norman Green, Nelson Willis, and to divers other persons, strong and spiritous liquors and wines, to wit, one pint of whiskey, one pint of rum, one pint of gin, one pint of brandy, one pint of wine and one pint of strong beer, to each of the above mentioned persons, to be drank in the house, and in the shop, and in a certain out-house, and in a certain yard, and in a certain garden appertaining thereto, without having obtained a license therefor as a tavern keeper, contrary to the provisions of the ninth title of the twentieth chapter of the first part of the Revised Statutes of the State of New-York, and against the peace of the people of the said state and their dignity. And the jurors aforesaid, on their oath aforesaid, do further present: That the said Joseph Wheelock, on the sixteenth day of January in the year last aforesaid, and at divers other times between that day and the day of the finding of this inquisition, at the town and in the county

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last aforesaid, did sell and cause to be sold to divers individuals, to wit, to Harmon Parish, Hiram Willis, Norman Green, Nelson Willis, and to divers other persons, strong and spiritous liquors and wines, to wit, one pint of whiskey, one pint of rum, one pint of gin, one pint of brandy, one pint of wine and one pint of strong beer, to each of the said persons, and did then and there suffer the said liquors and wines so sold and caused to be sold by him as aforesaid to be drank in his house, and in his shop, and in a certain out-house, and in a certain yard, and in a certain garden appertaining thereto, without having obtained any license therefor as a tavern keeper, contrary to the provisions of the ninth title of the twentieth chapter of the first part of the Revised Statutes of the State of New-York, and against the peace of the people of the said state and their dignity.

JAMES WOOD, Jr.,
District Attorney.

The defendant having plead not guilty, the issue came on to trial in the county sessions of Livingston county, before Scott Lord, county judge, and the justices of the sessions, with a jury, and it was proved, on behalf of the people:

That on the 16th day of January, 1854, the defendant sold one glass of beer called Dutch beer, and received pay therefor from one Henry Parish. The witness stated that he did not know what kind of beer it was; there was a difference in beer.

The district attorney asked the witness if it was intoxicating liquor. The defendant's counsel objected to the question on the ground that it called for the opinion of the witness. The court overruled the objection, and the counsel for defendant excepted. The witness answered that it was, if one drank enough of it. The witness further stated that he bought one glass of Dutch beer of defendant on the 16th day of January, 1854, and paid him for it. The district attorney offered to prove by the witness that defendant sold

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intoxicating liquors on other days and at other times than 16th day of January, 1854. Defendant's counsel objected. The court overruled the objection, and the defendant's counsel excepted. The witness also stated that he knew of defendant's selling a glass of the same kind of beer to one Chapman, in March, 1854. Witness also stated on his cross-examination that he had seen and drank strong beer; never knew of any one getting intoxicated on Dutch beer; that it had not the same taste as strong beer; was not as strong as strong beer, though stronger than small beer. The district attorney then called a witness and proved that he bought beer of defendant in winter of 1854, and paid for it; it was Dutch ale; does not think it is intoxicating. Witness had drank it with other liquors, then it would intoxicate; small beer taken after whiskey would have the like effect, but not so great effect; think it stronger a good deal than small beer, and not as strong as strong beer. Whereupon the said defendant's counsel insisted that the several matters given in evidence on the part of the people were not sufficient to authorize the jury to convict the defendant of violating the statute in relation to the sale of spiritous liquors, and that there was no evidence before the jury of the defendant's having sold any spiritous liquors or strong beer, as charged in the indictment, and asked the court so to instruct the jury; but the court refused, and the defendant excepted. The defendant, by his counsel, then asked the court to charge the jury that there was a material variance between the proof as given by the people and the charge in the indictment, and that the proof did not sustain the allegations in the indictment. The court refused so to instruct the jury, and the defendant, by his counsel, excepted. The defendant's counsel asked the court to quash the indictment on the ground that the proof did not sustain the averments in the indictment. The court refused the motion, and the defendant, by his counsel, excepted.

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The court then charged the jury that the question for them to pass upon was whether or not the beer as described by witness had been sold by defendant, and if they believed the witness they were authorized to convict the defendant; that as a question of law the beer described by the witness was strong or spiritous liquor within the meaning of the statute; the defendant excepted, and the jury found the defendant guilty.

A bill of exceptions having been made and settled, a *certiorari* was sued out and the proceedings brought up for review.

R. P. Wisner, for defendant.

I. The court erred in permitting the witness to give his opinion in regard to the effect produced by the article when drank. The indictment specifies the kind of liquor sold by defendant, and it cannot be aided by the opinion of the witness, that the beer sold would intoxicate. The proof received was immaterial under the ruling of the judge.

II. The court should have instructed the jury that there was no evidence before them that defendant had sold any such liquor as charged in the indictment. The term strong beer, as used in the indictment, has a specific meaning, and must be understood to include only that liquor known and recognized as strong beer. It is not a generic term, and cannot include the different kinds of beer used at the present day. The people having made a specific charge against the defendant, they were bound to prove it as laid.

III. The charge of the court as given, and the refusal of the court to charge as requested, were equally erroneous. If the court was right in receiving the evidence of the effect of the beer when drank, then there was a question of fact for the jury to pass upon. If the crime charged in the indictment consisted in the sale of beer that would produce intoxication when drank, then clearly a question of fact was

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presented for the consideration of the jury. The court having decided that "Dutch beer" came within the terms of the indictment, without reference to its effect upon those who drank it, took away from the defendant the right to prove its composition, or to give any evidence to show that it was not "strong and spiritous liquors and wines."

James Woods, Jr. (District Attorney), for the people, cited *Nevin v. Ladue* (3 *Denio*, 43, 437).

By the Court, T. R. STRONG, J.—The word "beer," in its ordinary sense, denotes a beverage which is intoxicating, and is within the fair meaning of the words "strong or spiritous liquors," used in the statutes applicable to this case. (*Webs. Dict.*, "Beer;" *Nevin v. Ladue*, 3 *Denio*, 43; *same case in error*, *id.*, 437.) Some qualifying word may be used in connection with the word "beer," as "root beer," "molasses beer," &c., and the two together signify a drink which is not intoxicating, and it may also be shown, by proving the materials and the mode of production of what is called "beer," that it is not an intoxicating drink; but when the sense is not thus restricted, the word must be understood to mean one kind of the "strong and spiritous liquors" referred to in those statutes. The "beer" in the present case was "Dutch beer;" but there is nothing in the ordinary sense of the word "Dutch" to qualify the meaning of the word "beer," when used alone, in respect to intoxicating qualities. No evidence was given of the mode employed or materials used in making it. I think, therefore, in the absence of such evidence, the judge was right in advising the jury that "the beer described by the witnesses was 'strong and spiritous liquors' within the meaning of the statute."

The indictment charges the sale of "strong and spiritous liquors," to wit, among other liquors, "one pint of strong beer." The evidence is that the defendant sold "Dutch

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beer," and, as I understand the bill of exceptions, the counsel for the defendant objected that this proof varied from and did not support the indictment, as "Dutch beer" is not "strong beer." I do not think there is a material variance. The terms "strong beer" and "Dutch beer," without explanation, must both be understood to mean intoxicating liquors of a similar character, produced from similar materials, and in a like way, to express which the former term is appropriate. By "strong beer" is understood, I suppose, a malt inebriating liquor, and I understand that "Dutch beer" is a malt inebriating liquor, not differing substantially from "strong beer," thus understood, in the kind of materials used or the mode of its manufacture, but only in its strength, being less intoxicating. As well might it be urged, if the sale of "ale" was proved, that the charge of selling "strong beer" was not sustained, as to object that the proof of the sale of "Dutch beer" does not support the indictment.

New trial denied and proceedings remitted to the sessions.

SUPREME COURT. New-York General Term, May, 1855. *Mitchell, Roosevelt and Clerke*, Justices.

PIERRE GOUGLEMANN, plaintiff in error v. THE PEOPLE, defendants in error.

The word "raviash" is necessary, in charging the offence, in an indictment for rape; and its omission in the indictment will, after conviction, be ground for reversal on error.

The plaintiff in error was indicted in the Court of General Sessions of the city of New-York for rape. The indictment was in the following form :

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City and County of New-York, ss:

The jurors of the people of the State of New-York, in and for the body of the city and county of New-York, upon their oaths, present: That Pierre Gouglemann, late of the first ward of the city of New-York, in the county of New-York aforesaid, on the first day of September, in the year of our Lord one thousand eight hundred and fifty-three, at the ward, city and county aforesaid, with force and arms, in and upon one Virginia Lyons willfully and feloniously made an assault, and with her the said Virginia, by force and with violence, and against the will and consent of her the said Virginia, then and there had carnal connection and sexual intercourse, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

The accused pleaded not guilty, and the jury found him guilty of an assault with intent to commit a rape, and he was sentenced to imprisonment in the state prison for the term of four years and ten months. The cause was brought into this court for review, by writ of error, and the proceedings on the judgment stayed.

Jonas B. Phillips, for plaintiff in error.

I. The record shows a palpable and fatal defect in the indictment, in the omission of the pleader to charge that the defendant did "*feloniously ravish*." The word "*ravish*" is essential, and cannot be supplied by any other term. (2 *Arch. Cr. Pl.*, 307; 12 *Waterman's Notes*; 1 *Hale*, 628, 632; *Hurman v. Commonwealth*, 12 *Serg. & Rawle*, 69; 3 *Chitty's Cr. L.*, 812; 1 *East.*, 447; 1 *Russ on Cr.*, 686, *Phil. ed.*, 1850.)

II. The statute defines the offence: 1. By carnally and unlawfully knowing a female child under the age of ten years; or 2. By forcibly ravishing any woman of the age of

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ten years or upwards. (2 R. S., 663.) The conviction in this case could not be pleaded in bar to an indictment framed under the first subdivision of the statute.

III. The record is also defective in finding Gouglemann guilty of an assault with intent to commit a rape. The indictment contains no such count, and if defective for the reason alone assigned, the conviction for the minor offence cannot be sustained.

A. Oakley Hall (District Attorney), for the people.

The prisoner contends, for error, that the indictment does not sufficiently charge the offence whereof he stands convicted.

I. What should any indictment show? As well said by this court, in *People v. Biggs* (8 Barb., 547), "That certainty and precision in an indictment is required which will enable the defendant to judge whether the facts and circumstances stated constituted an indictable offence; that he may know the nature of the offence against which he is to prepare his defence; that he may plead a conviction or acquittal in bar of another indictment, and that there may be no doubt as to the nature of the judgment to be given in case of conviction;" reaffirming, "It is sufficient if all the circumstances necessary to describe and render the charge intelligible in its legal requisites appear on the face of the proceedings and inform the defendant of the charge against him." (*People v. Phelps*, 5 Wend., 1.)

II. The requisites of the statute, in accordance with such an aim, are set forth in the indictment, either in the first or second subdivision. (2 R. S., 663, § 22.) 1. The first subdivision in words; 2. The second subdivision substantially. Could the words "forcibly ravishing" be better described than by the indictment: "with her, the said Virginia, by force and with violence, and against the will and consent of

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her the said Virginia, then and there had carnal connection and sexual intercourse."

III. It informed the defendant of the charge he was to meet.

IV. The words, "and her, the said Virginia, did then and there ravish," if added, might have obviated the prisoner's objection; but would its presence have made the charge more specific? If not, there was but an imperfection of form, cured by our statute of jeofails (2 R. S., part 4, ch. 2, tit. 4, § 51): "No indictment shall be deemed invalid, &c. (*subd.* 4), by reason of any other defect in matters of form, which shall not tend to the prejudice of the defendant."

1. He was not prejudiced, for the indictment put him on guard as to the offence for which he would be tried. 2. The word "ravish" is defined by Webster, "To have carnal knowledge of a woman by force and against her consent;" the words almost of the indictment.

By the Court, MITCHELL, J.—The plaintiff in error was tried at the general sessions, and found "guilty of an assault with intent to commit a rape above charged, in the form aforesaid, as by the indictment is above alleged against him." He was condemned to imprisonment in the state prison for four years and ten months. The indictment alleges that he willfully and feloniously made an assault upon one Virginia Lyons, and with her, by force and with violence, and against her will and consent, then and there had carnal connection and sexual intercourse. It does not use the word "ravish," and for this omission the writ of error is brought. The verdict is for an attempt to commit such a rape as is alleged in the indictment, and the sentence is on the supposition that the indictment contains all that is necessary on a charge of rape.

The elementary works all hold that the word "ravish" is essential in an indictment, and that no circumlocution can supply its place, and that in this it is like the word "murder."

Hale says (*Pleas of the Crown*, 628) the essential words in an indictment of rape are "*rapuit et carnaliter cognovit*;" but *carnaliter cognovit*, nor any other circumlocution, without the word *rapuit*, are not sufficient, in a legal sense, to express rape. He refers to the Year Books (9 *Edw. IV.*, 26, *a*); there the indictment alleged that the defendant feloniously took a woman and her then and there carnally knew, against her will, &c. The majority of the judges held this insufficient, and compared it to the case of murder, in which the indictment must contain that word.

Foster (*Crown Law*, 423, 4, *Appendix*), referring to this case, and to the diversity of opinion among the judges, says: "Broke, who abridgeth the case, concurs with the judges, who thought the indictment insufficient;" and he adds, "and this opinion is holden to be good law to this day;" and further adds: "So, if the indictment chargeth that the defendant, voluntarily and feloniously, and of malice aforethought, killed (*interfecit*), without saying '*murdravit*,' which is the word the statute useth, it amounts to no more than an indictment for *manslaughter*, and the offender shall have his clergy. So, in the case of buggary it was never thought sufficient to charge that the defendant *in quemdam A. B. insultum fecit, et cum eo felonice, contra naturam rem veneream habuit, ipsum que A. B. carnaliter cognovit*," which sufficiently describes the offence to a common intendment; but because the statute describes the offence by the term "buggery," the indictment goes on and charges "*peccatum illud sodomiticum, Anglice dictum 'buggery.'*"

Hawkins says (2 *Pleas of the Crown*, ch. 23, § 77): "No periphrasis or circumlocution whatever will supply a want of these *words of art* which the law hath appropriated for the description of the offence, from whence it follows that an appeal of death cannot amount to a charge of murder without the word *murdravit*, let it never be so exact and particular in setting forth the malice and all other circumstances of the killing; neither can an appeal of rape be sufficient without

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the word '*rapuit*,' nor an appeal of larceny without the word '*cepit*,' nor an appeal of mayhem without the word '*mayhemavit*.'" (*Id.*, ch. 25, § 110.) To the same effect are *Barbour's Criminal Law* (pp. 73, 332, 3); 3 *Chitty's Criminal Law* (p. 812); 1 *Russell on Crimes* (p. 686); and in *Harmon v. Commonwealth* (12 *Serg. & Rawle*, 69), while the court held that the words "against the will" were unnecessary after verdict, the indictment alleging that the defendant did ravish and carnally know, they quoted as authority the expressions of opinion above stated.

The chancellor seems to refer to these cases of murder, rape, mayhem and larceny, in which Hawkins says the law has appropriated certain terms of art which no circumlocution can supply, in *The People v. Enoch* (13 *Wend.*, 172, 3), where, after stating that when an offence is created by statute which was not an offence at common law, as a general rule the indictment must charge the offence to have been committed under the circumstances and with the intent mentioned in the statute, he goes on to say: "But even in that case it is not necessary to pursue the exact words of the statute creating the offence, provided other words are used in the indictment which are *equivalent*, or words of more *extensive* signification, and which *necessarily* include the words used in the statute; as when *advisedly* is substituted for *knowingly*, or *maliciously* for *willfully*, and the like." Then he adds, to show the limit to this laxity in pleading: "It is otherwise in indictments for common law offences, where the law has adopted certain *technical* expressions to *define* the offence, or to indicate the intention with which it was committed, in which cases the crime must be described, or the intention must be expressed, by the *technical terms prescribed and no other*. Thus, in an indictment for murder, the terms "*murder of his malice aforethought* are considered *absolutely* necessary in describing the offence; and if these words are left out of the indictment it will be considered a case of manslaughter."

The chancellor uses the case of murder as an illustration only, and does not confine the strict rule to that case alone, and his language is so similar to that of Hawkins, as above quoted, that it is plain he referred to the same instances to which Hawkins did, when he said that "no circumlocution whatever will supply the want of these *words of art* which the law hath appropriated for the description of the offence," and instances the word "ravish" as one, as well as the word "murder."

By all the authorities the term "murder" is essential in an indictment for that offence, and the term "ravish" in an indictment for the last offence; and the court has no more right to dispense with it in the last case than in the first. The common law made the word in the last case the word of art essential to its description, and the statute prescribing the punishment for the offence uses the same word of art, but the indictment omits it. Our statute curing certain omissions in indictments (2 R. S., 728, § 52) does not make any intendment in favor of an indictment after verdict that could not be made on demurrer. The distinction noticed by the chancellor and by Hawkins reconciles these authorities above quoted with what is said in *Biggs v. The People* (8 Wend., 547), and in *The People v. Phelps* (5 Wend., 1): these last were not for offences to which the law had applied certain peculiar words of art.

The sentence is for a felony, the offence a misdemeanor, and the sentence should be accordingly, or the sentence should be according to the legal acceptance of the offence found.

There should be a new trial at the general sessions.

Judgment reversed.

SUPREME COURT. At Chambers, Albany, August 17, 1855. Before
Parker, Justice.

THE PEOPLE *v.* JAMES CARROLL.

The act of April 2, 1850, regulating the police of the town of Watervliet, so far as it takes away from a person charged with an offence the right to give bail for his appearance at the next criminal court having jurisdiction, is an infringement of the right of trial by jury and is unconstitutional and void.

On the petition of the prisoner, a writ of *habeas corpus* was allowed in this case, addressed to Stephen Deitz, constable of the town of Watervliet, in whose custody he was detained and by whose return it appeared he was arrested by virtue of a warrant issued by Murray Hubbard, Esq., a justice of the peace of that town, on a complaint for assault and battery alleged to have been committed by the prisoner. It further appeared that, on being brought before the justice, the prisoner, within twenty hours after his arrest, demanded an examination and offered to give bail for his appearance at the next criminal court having cognizance of the case, both of which were refused by the justice, who required the prisoner to give bail to appear before him on the fifteenth day of August, instant, to be tried before him as a court of special sessions. The prisoner refusing to do so, the justice issued a commitment, under which the prisoner was detained at the time of the issuing of the writ of *habeas corpus*.

D. McElwain, for the prisoner.

S. G. Courtney (Ass't District Attorney), for the people.

PARKER, J. Under the general provisions of the Revised Statutes (2 R. S., 711, § 1) a person charged with assault and battery, on being arrested and brought before a magistrate, had the right to elect whether he would be tried before

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a court of special sessions or give bail to appear and answer at the next criminal court having jurisdiction. It is supposed this right has been taken away, as to all persons arrested in the town of Watervliet, by an act, passed April 2, 1850, regulating the police of that town. (*Laws of 1850*, 210.) By that act it is provided that whenever any person charged with any offence specified in section one, article one, title three, chapter two of the fourth part of the Revised Statutes, including assault and battery, shall be brought before a justice of the peace of the town of Watervliet, "it shall be his duty forthwith to hear, try and determine such complaint or prosecution, according to the provisions of said article, &c., whether the person charged with such offence requests to be so tried or not," &c.

Though the right to give bail is not taken away in express terms, I think the language plainly indicates a design to compel the person accused, against his choice, to be tried before the justice as a court of special sessions. The justice is directed to proceed forthwith to try the complaint, though the person charged may not request to be so tried. It does not detract from the force of this language that this is to be done according to the provisions of the Revised Statutes regulating trials before courts of special sessions. The trial is compulsory; in that respect it differs from the general provisions of the Revised Statutes; but the manner and form of trial are to be in accordance with those provisions. The complaint may be tried by the justice or by a jury of six, if the prisoner shall demand it.

Of the policy of that kind of legislation which denies to a person charged with an offence in Watervliet the right to have his case tried before twelve men in a higher criminal court, after it shall have passed the ordeal of a grand jury (a right enjoyed by all those who may be so fortunate, when arrested, as to be brought before a magistrate on the outer side of the town lines), it may not, perhaps, become me to speak in terms as strongly condemnatory as it deserves.

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Fortunately, there is an ample protection against such unequal and unjust legislation in the constitution of our state, which declares that "the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever." (*Const., art. 1, § 2.*) By "jury," in this clause of the constitution, is meant a common law jury of twelve men. Under the Revised Statutes, and at the time of the adoption of our present state constitution, every person charged with having committed an assault and battery had a right to give bail to appear and answer at the next criminal court, and thus to secure a trial by jury in the constitutional sense of the word. No legislation can deprive the citizen of that right. All legislative invasions of it are unconstitutional and void. For a more full discussion of this subject I refer to an opinion recently written by me, in giving construction of another statute, in *The People v. Kennedy* (2 *Park. Cr. R.*, 312.)

The act of 1850, under which the justice acted, is clearly inoperative and void, so far as it takes away from the person charged the right to give bail and to carry his case to the next county court having criminal jurisdiction, and the prisoner must therefore be discharged on giving bail in the sum of \$300.

SUPREME COURT. Monroe General Term, December, 1855. *Selden, Johnson and Welles*, Justices.

MARTIN EASTWOOD, plaintiff in error, *v.* THE PEOPLE,
defendants in error.

In civil cases, and cases of misdemeanor, if the jury separate, either with or without the leave of the court, it will not vitiate the verdict without additional evidence of irregularity or abuse; but in criminal cases of a higher grade, and especially in capital cases, such a separation, for however short a time, will be fatal to a verdict against the prisoner, unless it be shown affirmatively on the part of the prosecution, by the clearest evidence and beyond a reasonable doubt, that no injury to the prisoner could have occurred in consequence of the separation.

It is the modern practice of the courts to receive the affidavits of the jurors themselves in answer to a charge of irregularity or abuse, though they have generally been considered as an unreliable species of evidence.

If, after a cause has been submitted in a capital case, a jury receive any kind of evidence which can have the most remote bearing on the case, it will be fatal to their verdict.

When, in a capital case, after the testimony was closed, several of the members of the jury, while walking out for exercise, by leave of the court and in charge of an officer, visited and examined the place where the homicide occurred, and in regard to which the witnesses had testified, it was held to be a sufficient reason for granting a new trial.

On the trial of an indictment for murder, alleged to have been committed by a blow inflicted by the prisoner with a club in a sudden affray, it is admissible to prove that the prisoner was intoxicated at the time of the transaction (a); and, for the purpose of establishing that fact, a witness who was present at the time and was well acquainted with the prisoner, after describing the appearance and conduct of the prisoner, may be permitted to give his opinion as to the fact whether or not the prisoner was intoxicated (b).

MARTIN EASTWOOD was tried and found guilty of the murder of Edward Brereton, at the Monroe Oyer and Ter-

(a) *Vide The People v. Robinson* (2 Park. Cr. R., 235); also, *Same Case* (1 *id.*, 649).

(b) *Sed vide* the case of *Dewitt v. Barley* (5 Seld., 871), reversing the judgment of the Supreme Court, as reported (13 Barb., 550), and holding that, on a question as to the mental capacity of the grantor in a deed, the opinion of a witness, founded upon facts within his personal knowledge and disclosed by him on the trial, is not competent evidence.

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miner, in May, 1855, before Welles, justice of the Supreme Court, and the justices of the sessions.

In the course of the trial, *William Green*, called on the part of the defence, testified: That he was a connection of Eastwood, and well acquainted with him; that he arrived at the place of the affray a few minutes after Brereton was knocked down; that Eastwood's appearance was as if something was the matter with him; that he had been accustomed to see men under the influence of liquor and intoxicated.

The counsel for the defence then asked the witness the following question: "From his conduct and deportment and other facts connected with it, state whether, in your judgment, he was, to any considerable extent, under the influence of intoxicating liquors?" This question was objected to by the prosecution, on the ground that it was not competent for the witness to state his opinion; that he must be confined to the statement of facts, &c. The objection was sustained by the court, and the prisoner's counsel duly excepted to the decision.

The witness then testified that, after Brereton was knocked down by Eastwood, he discovered incoherence in Eastwood's speech; that he acted wild and quite different from what he formerly did; that he did not make many remarks; that he looked wild out of his eyes and very blue; that his breath smelt of liquor, &c.

After the verdict had been rendered, the prisoner's counsel moved for a new trial, on the ground that one-half of the jury had, during the trial, separated from their fellows, and gone to the place of the affray, and taken a view of the premises in the absence of their fellows, and in the absence of the prisoner and his counsel, and without permission from the court.

It was conceded, by the public prosecutor and the prisoner's counsel, that, on the evening after the evidence was closed, six of the jurors went, under the charge of one of the constables who had the jury in charge, to the premises in

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question and viewed them ; that this was at the request of such jurors ; that, after viewing the premises, they returned to their fellows, having been absent about an hour ; that, during their absence, no one was permitted to speak to them and no improper conduct took place ; that, when they so left their fellows, it was for a walk for exercise, and without any intention of going to the premises mentioned, but that their walk being somewhat protracted, it extended to the place mentioned, where they stopped and looked around at the localities there, and for the purpose of the better understanding of the same.

The court denied the motion for a new trial, to which decision an exception was taken by the prisoner's counsel.

Eastwood was then sentenced to be executed.

A bill of exceptions having been settled, a writ of error was allowed by Mr. Justice Selden, by which the proceedings were brought before this court, with an express direction in the allowance that the same should operate as a stay of proceedings on the judgment.

On the argument of the cause in this court, affidavits were read by the prisoner's counsel showing the extent and character of the irregularities complained of, the substance of which is sufficiently stated in the opinion of the court (*a*). There was no assignment or joinder in error. (2 R. S., 741, § 23.)

T. Hastings and *L. H. Hovey*, for plaintiff in error.

I. It is conceded that writs of error in capital cases, and indeed in cases of felony generally, are matters of favor, and

(*a*) No objection appears to have been taken by the counsel for the prosecution to the reading of affidavits at the general term ; nor was it objected that an exception to a decision of the Oyer and Terminer denying a new trial was not available on writ of error. A bill of exceptions, in a criminal case, brings up for review only the decisions made *upon the trial*. (2 R. S., 738, § 21 ; 4 Denio, 9.) A motion for a new trial can only be made in the court where the indictment was tried.

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not of absolute right. Courts, in determining the question whether the writ shall issue in a particular case, will therefore exercise a sound judicial discretion, and may, very properly, inquire whether the error has been prejudicial to the accused. But it is insisted that this discretion ends with the allowance of the writ. The only question that can be presented upon the return is, has there been any error? This is the issue and the only issue in the case. The court cannot even inquire whether the error has been injurious to the accused. They must either affirm or reverse the judgment absolutely. After a judgment has been reversed, the court, in its discretion, may either discharge the defendant or order a new trial. (2 R. S., 826, § 26, 3d ed.) 1. At the common law, the Court of King's Bench could not grant a new trial in capital cases. (*Rex v. Mowbry*, 6 T. R., 638; 1 Arch. Cr. Pl., 177, and cases there cited.) 2. That court, on an issue upon a writ of error, could reverse a judgment for errors apparent on the record, or for errors in the judgment. (1 Arch. Cr. Pl., 198, and cases there cited.) 3. The only judgment authorized by the common law was that of affirmance or reversal. The court, even after the reversal of a judgment, could not order a new trial, until since the passage of an act of parliament, during the reign of the present sovereign, (1 Arch. Cr. Pl., 211, and cases there cited.) 4. The question whether any of the courts of this state have the right to grant new trials to persons convicted of felony, upon the merits, is very far from being settled. Mr. Justice Harris, in the recent case of *The People v. Morrison* (1 Park. Cr. R., 625), has assumed the ground that such power is vested in the courts of Oyer and Terminer, in a very elaborate opinion, in which he shows that this power is asserted and maintained in eighteen of the sister states. While this right is so freely used for the protection of a few dollars' worth of property, it is not a little singular that it should be repudiated where it might be absolutely essential to the protection of human life. The Supreme Court had previously, however, decided

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the question both ways. (*The People v. Stone*, 5 *Wend.*, 39.) 5. This court began at an early day to exercise its powers in correcting abuses and irregularities in courts of Oyer and Terminer, and of general and special sessions. In the case of *The People v. Townsend* (1 *John. Cas.*, 104), this court, acting upon the report of the judge who tried the cause, that the defendant had been convicted of the crime of perjury, and had fled before judgment, and that, after some years, he was again in custody, expressing at the same time the opinion that he was convicted against the weight of evidence, after full consideration, advised the court of Oyer and Terminer to order a new trial. This practice of affording its advice before judgment was followed by a long train of decisions. In 2 *Johnson's Reports*, 381, the case, a conviction for murder, was heard on a case submitted without writ. (2 *John.*, 477; 7 *id.*, 413; 4 *id.*, 423; 13 *id.*, 82, 90; 2 *Cow.*, 445; 4 *id.*, 26; 1 *Wend.*, 91, 198; 5 *id.*, 39, 251, 289; 7 *id.*, 417; 8 *id.*, 636 [heard on a case]; 9 *id.*, 265; 13 *id.*, 159, 351; 15 *id.*, 419.) In one instance, this court heard the matter as a case reserved by the Oyer and Terminer. (14 *John.*, 294.) Motions in arrest of judgment have also been frequent, occasionally on affidavits, but more generally upon a writ of *certiorari* or *habeas corpus*. (2 *John.*, 105; 18 *id.*, 115, 212; 2 *Cow.*, 445.) New trials were often granted on *certiorari*, before judgment, as in *The People v. Douglass* (4 *Cow.*, 26.) In all these cases, and in many others, this court exercised the same wide range of discretion that is now exercised on the question whether a writ of error shall be allowed. (*Case of White*, 22 *Wend.*, 167; of *Abbott*, for rape, 19 *id.*, 192; of *Rector*, *id.*, 569; of *Cott*, 3 *Hill*, 32; of *Hulse*, 1 *Park. Cr. R.*, 611; of *Bodine*, 3 *Hill*, 309; of *Shater*, 1 *Denio*, 281; 4 *Barb.*, 460; of *Freeman*, 1 *Comst.*, 9; 1 *Park. Cr. R.*, 147, 262, 340, 390.) 6. But prior to the Revised Statutes, the only remedy after judgment was by writ of error; and the judgment on such writ was always absolute, either for affirmance or reversal.

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(3 *John.*, 333; 7 *id.*, 314; 3 *id.*, 505; 9 *id.*, 70; 10 *id.*, 169.) 7. After the Revised Statutes were adopted, the court adopted the practice, on affirming a judgment, of entering an order that it be executed, and on reversal this court either entered an order of discharge or for a new trial. (8 *Wend.*, 595; 13 *id.*, 58, 159; 17 *id.*, 386, 541; 21 *id.*, 509; 25 *id.*, 465; 1 *Hill*, 351; 4 *id.*, 126; 5 *id.*, 294; 1 *Denio*, 9, 19; 4 *id.*, 91, 364, 529; 5 *id.*, 106; 1 *Park. Cr. R.*, 272, 340, 400.) 8. The doctrine from all these cases is obvious. When the court acts upon a case before judgment it will use its discretion, and look into the whole case to see if the conviction was just, and if the accused had had a fair trial, and when they find it so, they will in their discretion disregard technical niceties and irregularities; but when acting after judgment on a writ of error, the court simply inquires whether there is error. If they find there is, they then reverse the judgment, and if the error can be remedied on a new trial, they add an order to that effect. 9. The reason for this distinction is perfectly apparent. In the one case, the question is, ought we to grant a favor? and in the other, shall we protect a right? Ought we, by our judgment, to establish an unsafe precedent? When the law prescribes a certain course of action, can we with propriety say there is no error in omitting it?

II. The court below erred in disallowing the question put to the witness Green, whether in his judgment the prisoner was, at the time of the homicide, to any extent intoxicated, or under the influence of liquor. 1. The fact testified to by the witness, that he was accustomed to see men intoxicated, and under the influence of liquor, made him an expert. (*Greenl. Ev.*, 489, 490, 1st ed.; 1 *id.*, 440, 576, 580, n, 2d ed.) 2. But the question was proper on another ground. The fact to be proved belonged to that class of facts which can be proved in no other way. (*Greenl. Ev.*, 489, 490, 1st ed.; 1 *id.*, 440, 576, 580, n, 2d ed.; 1 *Stark.*, 54; *McKee v. Nelson*, 4 *Cow.*, 355; 2 *Stark.*, 191.) See also Mr. Justice Selden's

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very clear and able opinion in *The Rochester and Syracuse Railroad Company v. Budlong* (10 How. Pr. R., 289).

III. The mere separation of the jury was such an error as, upon a proceeding by writ of error after judgment, should be regarded as fatal. 1. By the common law, jurors were to be kept together, without meat, drink, fire or candle, until they agreed upon their verdict, as well in civil as in criminal cases. (*Bacon's Abr.*, tit. "Juries," G., 369.) Again, a separation in capital cases was not allowed. (*Id.*) 2. However much this rule has been relaxed in civil cases, not a single decision by the courts of this state can be found, except on applications to the discretion of the court, before judgment, for advice or for a new trial, which has gone the length of saying that such a separation was not error. The case of *Douglass* (4 Cow., 26) was only before the court on application to its discretion. The question is, therefore, still an open one in this state. 3. The rule that jurors should be kept together till they agree upon their verdict rests upon an immovable foundation. The general object of the rule was, to secure an honest, free and impartial or unbiassed verdict. (1.) It was to secure the jurors against the approaches of a corrupt and menacing official administration of tyrannical power. (2.) It was to guard them against bribery by parties or prosecutors. (3.) It was to keep them secluded from the influence of prejudiced individuals and communities, and especially from the influence of public opinion. 4. It is easy to see that, in view of this last particular, there is in this country a very great propriety in adhering strictly to the rule against a separation of jurors during the trial, especially of capital cases. While the press is permitted to spread before the public mind the detail of the crime for which an accused person is on trial, almost every man in the community is compelled, as it were, to make up his mind upon the question of guilt or innocence, and if jurors are permitted to separate or to stand or walk around where they can have access to the public voice or feeling, there can

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be little safety in jury trials. 5. Let it be decided and established as the law of the court that it is not error for jurors to separate during a trial and it would be folly to expect them to remain together. Such a decision would clear the door for all sorts of irregularities. 6. It is no answer to this argument to say, as some judges have said, that actual prejudice or corruption must be proved. Who shall find it out? The unhappy victim? But he is secluded from almost all external knowledge by bolts and bars, and the idea of his proving the fact is but a mockery. There can be no safety but in a strict adherence to the common law rule. 7. The court are to say whether there is error. If they find an error, can they change its name and say there is none? 8. But there are authorities to this point which ought not to be overlooked. The case of *Puffer*, convicted of murder in Pennsylvania (3 *Harris*, 468), is a case, and a very strong one, directly in point. There the jury separated, by permission of the court, on the express consent of the accused; and yet the court, on a writ of error, promptly reversed the judgment, solely on the ground of such separation. See the opinion of the court. (*Commonwealth v. McCall*, 1 *Virginia*, 271; 7 *Humph. Tenn. R.*, 544; 11 *id.*, 502.) In England there has been no application for a new trial on this ground. Resort is in such cases had to the pardoning power. (*Whart. Am. Cr. L.*, 895.)

IV. But the separation of the jury, connected with the fact that six of them went two miles to the premises, pending the trial, and took a view of the several localities, with the purpose of gaining a clearer insight of the case, without the permission of the court, and in the absence of the prisoner and his counsel, is an error which must be fatal to this conviction. 1. The prisoner had a right to be present and to meet his accusers and their witnesses face to face. He had an indubitable right to see and hear everything that was done or said, either by the court or jury, which might in the slightest degree bear upon the question of his guilt or

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innocence. Of this he and his counsel were deprived. 2. A view, in civil actions, was in former times granted by a special order of court, and the special object always was the more certain ascertainment of the facts. (*Bac. Abr.*, 372, *tit. "Juries," H.*) 3. These six jurors, therefore, by their view, took evidence bearing upon the issue, and particularly upon the credibility of the witnesses, without permission of the court, and in the absence of the accused. 4. It is no answer to say that the jury meant no harm, or that they were not tampered with. They deprived the prisoner of his right to know and witness everything that could by possibility influence their minds for or against him.

E. A. Raymond (District Attorney) and *W. S. Bishop*,
for the people.

I. It is a well settled principle of the criminal law that intoxication furnishes no excuse for the commission of crime. (*Whart. Am. Cr. L.*, 46; *Rosc. Cr. Ev.*, 784.) 1. The law holds a person responsible for a criminal act, though at the time he was intoxicated to such an extent as to be unconscious of what he was doing. (*The People v. Robinson*, 1 *Park. Cr. R.*, 649; *Rex v. Carroll*, 7 *Carr. & Payne*, 145, overruling *Rex v. Grindley*, 6 *id.*, 159; *United States v. Drew*, 5 *Mason*, 29; *Bennett v. The State*, *Martin & Yerger*, 133; *Cornell v. The State*, *id.*, 147; 1 *Hale*, 32.) 2. If a deadly or highly dangerous weapon be used by the person in effecting the homicide, drunkenness could not affect the consideration of his malicious intent. (*Whart. Am. Cr. L.*, 47; *Whart. Am. Law of Homicide*, 384, 5; *Rex v. Meakin*, 7 *Carr. & Payne*, 297; *Rex v. Cruse*, 8 *id.*, 546.) In this case, the evidence to prove the premeditated design of the defendant consisted not only in the threats and violent expressions made use of by him at the time, but also in the nature of the weapon, which was a deadly one; in the selection of it; in the preparation for the use of it; in the pursuit after the deceased; in the manner

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of inflicting the fatal blow and the attendant circumstances, together with the subsequent flight of the defendant. So that, without a word being spoken by the defendant immediately preceding the final affray, the inference would be almost irresistible that the design to kill was premeditated in his mind.

II. But allowing that it was competent to prove the defendant's intoxication, as bearing upon the question of his intent, the opinion of the witness Green was properly excluded. 1. It is a sound and general rule of evidence that testimony should consist of facts and not of opinions. (1 *Greenl. Ev.*, § 440; 1 *Phil. Ev.*, 759.) The two principal exceptions are: First. That the opinions of experts are admissible; Second. That, in a certain class of cases, the opinion of a witness may be received because of his inability, from the nature of the subject, to clearly and intelligibly describe its various features, and the reasons upon which his opinion is based. (1 *Greenl. Ev.*, § 440, *ed. of 1852, note*; *Carter v. Boehm*, 1 *Smith's Lead. Cas.*, *note.*) (1.) But the opinions of witnesses cannot be received where the inquiry is into a subject matter the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it. The most prominent cases on this point are: *McFree v. Nelson* (4 *Cow.*, 355); *Culver v. Halsam* (7 *Barb.*, 314); *Chary v. Chary* (2 *Iredell Law R.*, 78); *Morse v. State of Connecticut* (6 *Conn.*, 9); *Rochester and Syracuse Railroad Company v. Budlong* (10 *How. Pr. R.*, 290). They are entirely consonant with this modification of the exceptions to the rule. 2. Applying these principles to the present case, the opinion of the witness Green was inadmissible. He was not shown competent to give an opinion.

III. In regard to the separation of the jury, the general rule is, that the verdict will not be set aside on account of their misconduct or irregularity, even in a capital case, unless it be such as affects their impartiality or disqualifies them from the proper exercise of their functions. (*Whart.*

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Am. Cr. L., 895; *The People v. Douglass*, 4 *Cow.*, 26; *The People v. Beebe*, 5 *Hill*, 32; *The People v. Rawson*, 7 *Wend.*, 423; *The People v. Carnal*, 1 *Park. Cr. R.*, 256.) 1. In this state it was formerly held that mere separation without permission was *prima facie* evidence of misbehavior (18 *John.*, 218); but the better opinion now is, that to vitiate the verdict reasonable suspicion of abuse must exist. (*The People v. Douglass*, 4 *Cow.*, 26; *The People v. Ransom*, 7 *Wend.*, 423; *The People v. Beebe*, 5 *Hill*, 32; *Horton v. Horton*, 2 *Cow.*, 589; *Oliver v. Trustees*, 5 *id.*, 284.) In New Hampshire the same rule was adopted. (*The State v. Prescott*, 7 *New Hamp.*, 290.) Also in Connecticut. (*The State v. Babcock*, 1 *Conn.*, 401.) Also in North Carolina. (*The State v. Miller*, 1 *Dev. & Bat.*, 500; 1 *Haywood*, 238.) In Georgia and Tennessee it is held that if it be affirmatively shown that no communication was had with other persons after the separation, the verdict will be sustained. (*Hines v. The State*, 8 *Humph.*, § 597.) So also in Mississippi. (*McCarn v. The State*, 9 *Smede & Marsh.*, 465.) As to the rule in Massachusetts in regard to irregularities of a jury in a capital case, see *The Commonwealth v. Robey* (12 *Pick.*, 496). 2. The same rule is established by the English cases and authorities. (1 *Chitty Cr. L.*, 634; 2 *Hale's P. C.*, 306; *Rex v. Woolf*, 1 *Chitty R.*, 401; *Rex v. Kinnear*, 2 *Barn. & Ald.*, 462.) The case of *The Commonwealth v. McCaul* (*Virginia*) constitutes almost the only authority against this rule.

IV. If it be affirmatively shown that there is no reasonable ground to suppose that the separation or any of the subsequent acts of the jury had any influence upon the result of the case, the irregularity will not be deemed sufficient to set aside the verdict. (9 *Smede & Mars.*, 465; *Wilson v. Abrahams*, 1 *Hill*, 207, and cases there cited; *Smith v. Thompson*, 1 *Cow.*, 221; *The People v. Carnal*, 1 *Park. Cr. R.*, 256; *Taylor v. Everitt*, 2 *How. Pr. R.*, 23; *Harrison v. Rowan*, 4 *Wash. C. C. R.*, 32; *Everett v. Youells*, 4 *Barn. & Ald.*, 681; *Whart. Am. Cr. L.*, 897, 899, 901, 903; *Hines v.*

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State, 8 *Humph.*, 597; *Dana v. Tucker*, 4 *John.*, 487.) 1. It is shown beyond a reasonable doubt in this case, by the affidavits which have been read on the part of the prosecution: First. That the allegation of the defendant, that anything improper, or in any wise relating to the trial, took place at the temporary separation of the juror, James Murray, from the other jurors, on Wednesday evening, is false; Second. That the same is true in reference to the attempted impeachment of the conduct of Stephen Charles on the same occasion, and also of the communication between James H. Wood and his brother while the cause was being summed up; Third. That the charge that the constable and a juror drank liquor at Olmsted's tavern, on Thursday evening, is false; Fourth. That no communication relating to the trial was had with the jury on any of these occasions; Fifth. That the only act of the jury of which there is no dispute, upon any of these occasions of which the defendant complains, is the view which some of them had of the scene of the homicide, on Thursday evening.

V. The important inquiry, therefore, is, whether the view of the scene of the homicide, in its effect upon the minds of these jurors, was prejudicial to the prisoner. That such was not the effect appears from the affidavits of the six jurors who visited the ground. 1. The agreement to a verdict of guilty against the defendant was not induced by its effect on their minds, either in whole or in part. 2. There was no substantial disagreement between any of the witnesses as to the localities, which required consideration; and no testimony relating to them which needed explanation. 3. No issue was made in the course of the trial upon the localities, or upon the position of any of the witnesses, or of the deceased and of the defendant.

VI. Unless this view of the premises can be shown to have operated unfavorably towards the defendant, the verdict should not on that account be set aside. (2 *Hale P. C.*, 306; *Hudson v. The State*, 9 *Yerger*, 468; *Rex v. Sutton*, 4

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M. & S., 532 ; *Whart. Am. Cr. L.*, 903 ; *The People v. Carnal*, 1 *Park. Cr. R.*, 256, 260 ; *Taylor v. Everett*, 2 *How. Pr. R.*, 23 ; 1 *Arch. Cr. Pl.*, 178.)

VII. The separation of the jury, and the subsequent conduct of the six jurors, in a case of this magnitude, may subject them to animadversion and fine, but it should not set aside the verdict rendered in this case, which is entirely in accordance with the facts proved, and the law, as laid down by the court in their charge.

By the Court, SELDEN, J. I will first consider that branch of the motion which is founded upon certain alleged irregularities on the part of the jury. The affidavit of Cornelius Fielding states that on the evening of Wednesday, May 9th, 1855, being the third day of the trial, several of the jurors passed him on New Main-street, in Rochester, about three-fourths of a mile from the court-house, and stopped at Stillson's block, at the corner of New Main and Franklin streets; that he immediately crossed over towards them and went into Coatsworth's grocery store, situated upon the corner, and as he was going in he saw Stephen Charles, one of the jurors, in the store, about thirty feet from the door, talking with Coatsworth, and in company with another person who was neither an officer nor a juror; that the three continued in conversation some time; that he distinctly heard their voices but could not understand what they said; that while this conversation was going on, James Murray, another of the jurors, who lived in the upper part of Stillson's block, spoke and said he was "going up to see his folks," and immediately separated from his fellows and went up stairs; that he, Fielding, remained in the store some five minutes or more, and then went out and found three or four of the jurors only at the entrance where they stood when he went in; "*the rest except Murray having left.*"

This affidavit is corroborated in all its essential features by the affidavits produced on the part of the prosecution;

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for while nine of the jurors depose that, upon the occasion referred to by Fielding, when they stopped at the entrance to Stillson's block, they neither saw nor knew that Stephen Charles, one of their number, went into the store of Coatsworth, or separated at all from his fellows, yet Charles himself, who was foreman of the jury, testifies that he did go into the store and held conversation with Coatsworth, of one or two minutes, in regard to some private business of his own; and this is still further confirmed by the affidavit of Coatsworth, who says that he had such conversation with Charles at his store at some time during the sitting of the court at which Eastwood was tried. He says, it is true, that he thinks it was in the daytime, and after the jury was discharged; but in this he is contradicted by both Fielding and Charles, and is evidently mistaken. Charles says that he has no recollection that any third person was present at his conversation in the store, and both he and Coatsworth say they did not see Fielding, and yet the latter must have been there.

Again, eight of the jurors contradict Fielding's statement, that a portion of the jurors left their position at the entrance to the apartments of Murray during his absence, and yet it is clear that Fielding is correct in this; because he is supported in the statement by Murray himself, by Doty, another of the jurors, and by Targee, one of the constables having the jury in charge. The latter says that while Murray was gone, "several persons began to gather around the jurymen, and at the suggestion of the deponent, Olmsted, the other constable, started on with some of the jurymen upon Franklin-street, to avoid the crowd of persons beginning to gather around them." There is no doubt therefore of the general accuracy of Fielding's statement. These are the facts upon which the first allegation of irregularity is based.

The second rests upon the affidavits of Osborn Hanford and C. F. Backus; Hanford states that he resides in the immediate vicinity of the scene of the homicide; that on the evening of Thursday, May tenth, which it appears was

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just after the testimony was closed, but before the case was summed up, he saw six or eight of the jurors go to and examine the ground where the blow which killed Brereton was given, which is about two miles from the court-house; that they then crossed the road to his, deponent's, residence, where Mr. Hobbie, one of their number, opened the gate, stepped into the yard and placed himself upon the spot where his, Hanford's, daughter Elizabeth had testified upon the trial that she stood when she saw the defendant strike the deceased, and then turning his head and looking towards the place where the deceased fell, remarked that Miss Hanford had a good view from that point, and could see all that occurred. Hanford states that Stephen Charles, another of the jurors, remarked that deponent's daughter Elizabeth was the only man on the ground, as she was the only one who tried to prevent Eastwood from striking Brereton.

Backus confirms the statement of Hanford in respect to the visiting by the jurors of the ground, and as to one of the jurors placing himself within the gate at Hanford's house; and also states further that the jurors stopped at the pump in front of Olmsted's tavern, and while there the constable in whose charge they were went into the tavern and did not return until the jurymen had all left, and had gone eighty or one hundred rods towards the city; that a great many persons were passing in the street at the time, and the jury were not together or near each other, but were scattered along, some rods apart.

To meet these statements the affidavits of the six jurymen who visited the ground, with that of the constable who attended them, were produced. They state that on Monday, the first day of the trial, the judge who presided, in the presence of the prisoner and his counsel, and without objection on their part, gave permission to the jury to walk in the open air for recreation after the adjournment of each day, attended by the two sworn officers, without restriction as to the limits or direction of their walk; that on Thursday, after

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the testimony was closed, and after tea, six of the jurymen requested Targee, one of the constables, to attend them upon a walk, which he consented to do; that the other six jurors said they preferred to remain at the hotel; that James H. Wood, one of their number, a brother of the superintendent of the House of Refuge, proposed that they should walk in that direction, which they accordingly did; that after reaching the House of Refuge they concluded to walk on, and five of the jurors say they approached the scene of the homicide before they were aware of it; but Stephen Charles, the foreman, and Targee the constable, both say that, after getting nearly there, one of their number said in substance that as they had gone so near the ground they might as well go on down there. They all say they had no other motive but curiosity in visiting the ground; that there was no controverted point of evidence which could be affected by it, and that their verdict was not in the least influenced by the view of the scene thus obtained. Charles also confirms Hanford as to the remark to the latter in respect to his daughter being "the only man on the ground," and although the six jurors all say that they left Olmsted's tavern in company with Targee, the constable, yet the affidavits of Targee himself, and of John Sweeney, the bar-keeper at the tavern, both produced on the part of the prosecution, go strongly to corroborate that of Backus upon this point.

Backus says that while the constable was in the tavern something was said about a bill which the constable offered to the bar-keeper, and that the former did not leave the bar-room until the jurors had all left and gone eighty or one hundred rods. Targee admits that the jury had all started for the city before he left the tavern, but says they had gone only a few rods; that he bought a single cigar at the bar and paid for it by a one dollar bill, and received the change, and denies that anything whatever was said about the character of the bill. Sweeney, on the contrary, says that Targee handed him a one dollar bill which he at first sup-

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posed was bad, but finally ascertained was good, being so informed by Backus. The affidavit of Backus, therefore, seems to be pretty fully confirmed in all respects except one. He states that Targee bought liquor at the bar instead of a cigar, but this is contradicted by both Targee and Sweeney, and conceded by the prisoner's counsel to be an error. It appears that Backus was sitting upon the porch in front of the tavern, and his supposition that the bill was offered in payment for liquor was probably a mere inference. The only other discrepancy between his statement and that of Targee is as to the distance which the jurors had gone when the latter left the tavern. These are the essential facts relied upon to support this branch of the motion. The question is, are the irregularities thus shown sufficient to vitiate the verdict?

The early doctrines of the common law in regard to the misconduct of jurors have been greatly modified in more modern times. It seems to have been regarded by the older writers as an inflexible rule that after the jury were once sworn and the trial commenced, they could not, in either a civil or criminal case, be permitted to separate, except in cases of evident necessity, and that any unauthorized separation would be fatal to the verdict. (*Co. Litt.*, 227; *Fost.*, 27; *Trials per Pais*, 249; 4 *Bl.*, 360.) This rule, however, began at an early period to be relaxed in civil cases and cases of misdemeanor. In the case of *Lord St. John v. Abbot* (*Barnes*, 441), cited by Judge Cowan in his note to *Smith v. Thompson* (1 *Cow.*, 221), two or three of the jurymen, after the cause had been submitted to them, separated from their fellows and came into the court. The judge, on being informed that they were in court, asked them what they did there, to which they answered that they could not agree, whereupon they were sent back to their fellows, and afterwards a verdict was found for the plaintiff. The court was of opinion that the jury were punishable for their mis-

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conduct, but that it was not sufficient cause for setting aside the verdict.

The rule which seems to have been adopted in that case has been followed ever since, and is still the rule in this, if not in other states, as well as in England, viz., that the party who seeks to avoid a verdict in a civil case, on the ground that the jury have separated, whether such separation be with or without the authority of the court, must show affirmatively that the separation has, or may probably have had, some effect upon the verdict.

The cases of *Smith v. Thompson* (1 Cow., 221), *Horton v. Horton* (2 id., 589), and *ex parte Hill* (3 id., 335), are sufficient to show the ruling of the courts in this state on the subject. That the rule in cases of misdemeanor is the same is abundantly settled both in this country and in England. In *Bul. Nisi Prius*, 308, it is said that "At the present day it appears that the jury will not be permitted to disperse, after they have retired for the purpose of considering their verdict; although in a case of misdemeanor, a dispersion of the jury, with the judge's concurrence, on an adjournment taking place during the progress of a trial, will not be sufficient to avoid a verdict." Later authorities show that when the dispersion is without the authority of the judge, although the jurors themselves may be punished, the rule so far as the validity of the verdict is concerned is the same. The leading case on the subject is that of *Rex v. Woolf* (1 Chitty 401), which was an indictment for a conspiracy. There, on motion to set aside a verdict on account of the separation of the jury, all the cases were examined, and it was finally held that "in cases of misdemeanor" the dispersion of the jury alone is not sufficient to vitiate a verdict. The separation in that case was by permission of the court; but upon this subject Abbott, Ch. J., said: "The only difference that can exist between the fact of the jury separating with or without the approbation of the judge, as it seems to me, is this: that if it is done without the consent or approbation of the judge,

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express or implied, it may be a misdemeanor in them, and they may be liable to be punished."

In the later case of *Rex v. Kinnear* (2 Barn. & Adolph.), where the jury separated without leave of the court, this opinion of Ch. J. Abbott was approved and adopted. In this state the rule is the same, and no distinction whatever is made between cases of misdemeanor and civil cases. (*The People v. Alcott*, 2 John. Cas., 301; *The People v. Beebe*, 5 Hill, 32.)

But the question we have now to consider is whether the same rules are to be applied to criminal cases of a higher grade, and especially to capital cases. In *The People v. McKay* (18 John., 212), Spencer, Ch. J., in giving his opinion, refers to a case in which this question arose. He says: "A case analogous in principle occurred in Ontario county, in 1814. A woman of color was indicted and tried for murder and found guilty. The jury had separated, after agreeing on a verdict, and before they came into court, and on that ground a new trial was granted." This, so far as appears, is the only authority in this state directly upon the point. There are, however, subsequent *dicta* which it is necessary to examine.

In *The People v. Ransom* (7 Wend., 41), after referring to several of the civil cases bearing upon the question, Sutherland, J., says: "That the doctrine upon this subject is the same in criminal, and even in capital cases, as in civil, is clearly settled." He then refers to *The People v. Douglass* (4 Cow., 26), and after briefly stating the facts, says: "Upon an application for a new trial for this misconduct of the jury, each of the judges expressed a decided opinion that the mere separation of the jury, though in violation of their duty and against the express directions of the court, and although in a capital case, would not of itself be a sufficient cause for setting aside the verdict."

These *dicta*, together with what was said in *The People v. Douglass* (*supra*), have been treated as unsettling the law

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upon this question in this state. Mr. Wharton, in his work on *American Criminal Law*, after stating the rule in several of the states, says: "In New-York, mere separation without permission appears formerly to have been considered *prima facie* evidence of misbehavior," citing the opinion of Spencer, J., in *The People v. McKay*. "But," he proceeds to say, "the better opinion now is, that to vitiate the verdict, reasonable suspicion of abuse must exist," for which he cites *The People v. Douglass*, and *The People v. Ransom (supra)*. It is very doubtful, however, whether the somewhat loose *dicta* of the judges in these two cases, which were entirely *obiter*, ought to be considered as overthrowing the direct decision upon the point referred to by Chief Justice Spencer, in *The People v. McKay*, even if they were the only authorities upon the subject. Besides, it will be seen on examination that the remark of Judge Sutherland, in *The People v. Ransom*, in regard to the opinions of the judges in *The People v. Douglass*, is not fully borne out by the latter case; for while it is true that Judge Woodworth does in that case say, in substance, that the mere fact of separation, unaccompanied by any further evidence of abuse, is not sufficient to avoid the verdict even in a capital case, to which Judge Sutherland himself may perhaps be considered as having given a *quasi* assent, yet Chief Justice Savage expressly reserves his opinion upon the point. He says: "*Upon so grave a question as that of the life or death of a fellow-citizen, I am not prepared to say that the separation of the jury contrary to the instructions of the court, and mingling with the throng about the court-house, should not affect their verdict; but I do not deem it necessary to express an opinion upon this point.*"

There is at most, therefore, so far as this state is concerned, but the mere *obiter dicta* of two judges to oppose to the direct decision of the Supreme Court in 1814, confirmed as it is by the reference to it by Chief Justice Spencer, in *The People v. McKay*. But if it be doubtful which of these opinions ought

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to prevail, if taken by themselves, there is an overwhelming preponderance of authority in other states in favor of the earlier decision. The leading case on the subject in the United States is that of *The Commonwealth v. McCaul* (1 *Virginia*, 271). The case was ably and elaborately argued by the late William Wirt for the prisoner and Attorney-General Nicholas for the commonwealth; and it was there unequivocally held that the mere separation of a jury in a capital case, unless from absolute necessity, is sufficient to vitiate the verdict, and that it is not necessary for the prisoner to give affirmative evidence of any additional abuse. The principle of this case has been generally followed by the courts in this country, with, however, this addition, not at all inconsistent with it: that when it is affirmatively shown on the part of the prosecution that no injury could have resulted to the prisoner from the separation, the verdict will not be set aside.

As the principle we are considering is of the highest importance, and as it is desirable; in view of the strong interest the case has excited, that the correctness of our conclusions should be clearly established, I feel justified in bringing under review a few of the later American cases, in the order in which they have arisen. The first which I shall notice is that of *The Commonwealth v. Roby* (2 *Pick.*, 496), decided in 1832. In that case the question we are now considering did not directly arise, the irregularity complained of consisting of the jury being furnished, by the officer having them in charge, with food and drink, while deliberating upon their verdict. But Ch. J. Shaw, in the course of his opinion, refers to the decision of the General Court of Virginia, in the case of *The Commonwealth v. McCaul*, and then says: "The court in New-York, in *The People v. Douglass*, intimated that this went somewhat further than the common law. Whether it would be adopted as a rule here it is not necessary to inquire. *It is manifest that by such separation the jury might be thus exposed.*" Again, he says:

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"The result of the authorities is, that where there is an irregularity which may affect the impartiality of the proceedings, as when meat and drink and other refreshment has been furnished by a party, or when the jury have been exposed to the effect of such influence, *as where they have improperly separated themselves, or have had communication not authorized, then, inasmuch as there can be no certainty that the verdict has not been improperly influenced, the proper and appropriate mode of correction and relief is by undoing what has been improperly and may have been corruptly done.*" This language of the learned chief justice shows conclusively that he concurred in the decision of the General Court in Virginia, rather than the *dicta* of the judges in *The People v. Douglass*. The next case is that of *The State v. Prescott* (7 N. Hamp., 287). In this case, where the jury had separated, the Supreme Court of New Hampshire expressly dissented from the doctrine of Judge Sutherland, in *The People v. Ransom*. After quoting some of his remarks, Parker, J., says: "But we think there is another principle which should also be applied in a criminal case, which is, when there has been an improper separation of the jury during the trial, if the verdict is against the prisoner he is entitled to the benefit of a *presumption* that the irregularity has been prejudicial to him; *and that it is incumbent upon the government to show, and that beyond a reasonable doubt, that the prisoner has suffered no injury by the departure from the forms ordinarily pursued in the administration of justice.*" This is the precise doctrine for which I contend, and is stated in the clearest and most unequivocal terms; but as I desire to leave no doubt of the correctness of my conclusion upon this point, I shall not rest the argument here.

In the case of *McLain v. The State* (10 Yerger, 241), a portion of the jury had several times separated from their fellows, and remained absent fifteen or twenty minutes, without being under the charge of an officer. The court set aside the verdict, and Yusney, J., in giving his opinion, cites and

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expressly approves of the case of *The Commonwealth v. McCaul*. In reference to that case he says: "The separation of the jury in that case was not under more exceptionable circumstances than in this; neither was there proof of any actual tampering or conversation on the subject of the trial with the jurymen. The court held that it was not necessary that this should be proven in order that the verdict should be set aside and a new trial granted. This decision is, we think, supported by English authority."

A few years later, the case of *Overbee v. The Commonwealth* (1 *Robinson*, 756) occurred in Virginia, in which the court having given five of the jurors leave to retire for a few minutes, attended by an officer, a sixth started after them unobserved by the court. This juror not returning with the other five, an officer was immediately sent to bring him in, which he did about a minute afterwards. There was a crowd about the door, but the juror testified that he held no communication with any one; and yet the court set aside the verdict.

In the case of *Hines v. The State* (8 *Humph.*, 597), one of the jurors absented himself from the others ten or fifteen minutes. He testified that his absence was owing to indisposition, and that he had no communication with any one; but the court nevertheless granted a new trial.

The Supreme Court of Mississippi, in the case of *McCann v. The State* (9 *Smedes & Marsh.*, 465), held, upon an indictment for murder, that when any portion of the jury have separated from the others and had intercourse or opportunity of intercourse with third persons, and it shall not affirmatively appear that no effect was produced upon the jury by such exposure, and the possibility of undue influence be not wholly negatived, the verdict will be set aside.

In the subsequent case of *Boles v. The State* (13 *Smedes & Marsh.*, 398), which was also an indictment for murder, and in which, while the jury were deliberating, a barber had been admitted to their room and remained an hour or more,

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and the jury had sat by the side of others at the table; the same court set aside the verdict, although the officer testified that he had heard no one speak to the jury about the case, and there was no proof that a word had been said by the barber on the subject of the trial.

In the case of *Peiffer v. The Commonwealth* (3 Harris, 468), in which the prisoner was indicted for the murder of his wife, after the jury were sworn, in consequence of a press of business in the quarter sessions, they were allowed by the express authority of the court, and with the consent of the prisoner's counsel, to separate and go to their respective homes, under an arrangement that they should return on a particular day of the term to attend to the trial. The prisoner was convicted, and, upon writ of error, the conviction was reversed and a new trial ordered.

The Supreme Court of Tennessee also held, in the case of *Wesley v. The State* (2 Humph., 502), that a circuit court has no power in a capital case to authorize the separation of the jury, even with the consent of the prisoner and the counsel for prosecution.

These cases when combined produce a weight of authority far greater, in my view, than would be required to overbalance the *obiter dicta* of the two judges in the case of *The People v. Douglass*. They establish incontrovertibly the doctrine that, while in civil cases and cases of misdemeanor, if the jury separate, either with or without the leave of the court, it will not vitiate the verdict, without additional evidence of irregularity or abuse, yet that in criminal cases of higher grade, and especially in capital cases, such a separation, for however short a time, will be fatal to a verdict against the prisoner, unless it is shown affirmatively on the part of the prosecution, by the clearest evidence and beyond a reasonable doubt, that no injury to the prisoner could have occurred in consequence of the separation.

Let the present case, then, be tested by these principles. We will look first at the irregularity disclosed by the

affidavit of Fielding. It is undisputed that Murray, one of the jurors, separated from his fellows, entered the so-called Stillson block, in which he resided, and was absent, according to the statement of Fielding, in which he is confirmed by Targee, the constable, five minutes. During this time he was beyond the observation either of the constable or of any of his fellow-jurors, and the only explanation of what had occurred is from his own affidavit. It was once held that the affidavits of jurors could not be received at all to repel a charge of irregularity. In the case of *Taylor and Webb*, which arose in 1653, a motion was made to set aside the verdict because some writings had been delivered to the jury by a stranger. Lord Hale, who was counsel in the case, and opposed the motion, produced the affidavit of the foreman of the jury that they had not looked at the writings. But the court refused to listen to the affidavit. Rolle, Ch. J., said: "The affidavit of the jury ought not to be allowed to make good their own verdict; for now they are, as it were, parties, and have offended, and shall not be allowed by their own oath to take off their offence." (*Trials per Pais*, 225; *Viner's Abr. Trial*, 448, pl. 6.)

But, notwithstanding this early decision, it has no doubt been the practice of the courts to receive the affidavits of the jurors themselves in answer to a charge of irregularity or abuse. They have, however, generally been considered as an unreliable species of evidence. In *Commonwealth v. McCaul* (*supra*), Wilson, J., says: "From the mode in which collusion and tampering is generally carried on, such circumstance is generally known to no person except the one tampering and the one tampered with, or the persons between whom a conversation might be held which might influence the verdict. If you question either of these persons on the subject, he must criminate or declare himself innocent, and you lay before him an inducement not to give correct testimony."

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In the case of *Hines v. The State* (8 *Humph.*, 597), the court say: "The only witness who gives any explanation whatever is the offending juror. This affidavit, it is true, excludes the possibility that he was tampered with, if his testimony shall be deemed sufficient to establish the fact. But we do not think this affidavit can be relied on as proof of the innocence of his conduct." But admitting that the affidavit of a juror who separates himself from his fellows is alone sufficient to repel the presumption of danger to the prisoner which arises from the bare fact of separation, what does the affidavit of Murray in this case show? He simply says that "he did not say a single word, directly or indirectly, to a single person, after leaving the jury until his return to them, about the trial or the subject matter thereof." He does not say who was in the house into which he went, how many persons he saw while there, nor what was said to him or in his hearing. It is not so much what jurors say to others that is to be guarded against as what others say to them. This affidavit affords no evidence whatever that the juror, while absent, did not hear remarks of the most improper character, which might have influenced him in regard to the verdict. I concede this to be improbable. But is probability enough where life is at stake? As was said by Parker, J., in *The State v. Prescott* (*supra*), "these irregularities may not have affected the prisoner, but that is not enough. Even if it was probable they had not, mere probability would not suffice." If the separation of the juror Murray from his fellows was the only irregularity in the case, the strict legal rule would require us to say that it was not fully explained. But this is not all. The foreman of the jury, Charles, also left his associates, entered a store, and had a conversation of some minutes with the proprietor, Coatsworth, upon private business of his own, without the consent or even knowledge of the officer having the jury in charge. This was highly improper, but if fully explained would not vitiate the verdict. The affidavit of Charles,

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produced in explanation, is more full than that of Murray, and supported, as it is to some extent, by that of Coatsworth, may perhaps be regarded as sufficient to show that the verdict could not have been affected by the circumstance. But the affidavit of the officer, Targee, discloses a fact of serious import. He says that while Murray was absent, "several persons began to gather around the jurymen," and that at his suggestion the other officer, Olmsted, "started on with some of the jurymen upon Franklin-street to avoid the crowd of persons beginning to gather around them." It is to be inferred that the persons gathering around them knew that they composed the jury in Eastwood's case. What was said by the persons composing this crowd? Of this we are not informed. It is true that all the jurors whose affidavits were read testify that they held no communication, directly or indirectly, with any person in regard to the trial during their absence from the hotel. I am disposed to consider this as equivalent to saying that they heard no remarks from any one bearing on the subject; but there are two of the jurors from whom no affidavit is produced: who shall speak for them? It is true that those jurors whose affidavits are produced severally swear that neither they themselves, nor any other of the jurors, to their knowledge, held any communication with any person at any time during their absence from the hotel, and this is confirmed by the affidavit of Targee; but when it is considered that not one of them, as they all swear, including the constable, Targee, was aware of the fact that the foreman, Charles, went into the grocery and had a conversation there of some minutes with Coatsworth, it may readily be seen how much their affidavits, as to what others did, are, under the circumstances, worth.

Now, in view of the fact, testified to by Targee, that the jury, while waiting for their associate, Murray, were so pressed upon by the crowd that the officers were compelled to separate them into two parties to avoid the throng, are we not bound to hold that the interest manifested by the

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crowd on this occasion creates a probability that something was said in relation to the case of Eastwood which should be met and repelled? In the language of Parker, J., in the case of *The State v. Prescott* (*supra*), we may with propriety say: "If, in this resort to so public a place by jurors, during a trial which excited great interest, some of them did not hear remarks relative to the trial, or the guilt or innocence of the prisoner, *it would be a remarkable evidence of caution on the part of the spectators generally*; much greater caution than is usually exercised in such places upon like occasions." Assuming, then, that it is satisfactorily shown that none of the ten jurors whose affidavits are produced heard any remarks from the crowd (a point upon which their statements are by no means explicit), how does it appear that the other two jurors heard nothing? In my view, we are without any reliable evidence on that subject, in respect to which the burden of proof was clearly thrown upon the prosecution.

But there is another irregularity to which, notwithstanding the prolixity into which I have been unwillingly led by my desire to make this matter clear, I feel bound to give a moment's attention, viz., the visit of the six jurors to the scene of the homicide. I shall, however, pass over all the details of this visit, and all exposures to improper influences connected with it, except in a single aspect. It is a well settled rule that if a jury, after a cause is submitted to them, receive any kind of evidence which can have the most remote bearing upon the case, it will be fatal to their verdict. So scrupulously is this rule adhered to, that when the solicitor for the plaintiff, after the evidence was concluded, delivered a bundle of depositions to the jury, a portion of which were not in evidence, a verdict for the plaintiff was set aside, though the jury swore they had not opened the bundle. (2 *Hale's P. C.*, 308.) In a case in Massachusetts, where a paper having some relation to the suit got into the hands of the jury by mistake, the court set aside the verdict, and

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refused to hear the testimony of the jury, that the paper had no influence upon their finding. (*Whitney v. Whitman*, 5 *Mass.*, 405.) It was held in an old case that if the jury send for a book, after departure from the bar, and read it, the verdict is voided. (*Viner's Abr. Trial*, 451, *pl.* 18.) And Lord Tenterden, on one occasion, refused to send to the jury a law book which they requested, although the counsel on both sides consented. (*Burrows v. Unwin*, 3 *Carr. & Payne*, 310.) In a comparatively modern case it was held that any communication, even from the court, not made in open court, and before the parties, will avoid the verdict. (*Sergeant v. Roberts*, 1 *Pick.*, 337.)

Suppose, then, the jury in this case had applied to the court for leave to take to their room a map of the ground where the homicide was committed, and the court, without the knowledge of the prisoner or his counsel, had granted their request, is there any doubt, in view of the authorities to which I have referred, that it would have vitiated their verdict? I apprehend there can be none; nor that, if the request granted had been to visit the ground, the effect would have been the same. Will it be contended that if the jury do that, of their own accord, which the court, if applied to, would have no power to authorize them to do, the verdict can stand? This cannot be maintained.

It is said that the jury were walking for recreation merely, pursuant to the leave given them by the court, and that their coming upon the ground in question was purely accidental; and such would be the inference from the affidavits of several of the jurors; but Charles, the foreman, testifies that, as they approached the place, one of their number remarked that "as they had got so near the ground they might as well go on down there," and in this he is confirmed by the affidavit of the officer, Targee. It is obvious, therefore, that their visit to the ground was intentional. Whether this visit had in fact any influence upon the verdict or not, the court will not inquire. It is plain that, in many cases,

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a view of the localities concerning which the witnesses had testified would have a weighty influence in determining the credit due to such witnesses, and it could hardly fail, in any case, to have more or less effect either to confirm or weaken the force of their testimony.

If we are to exercise in this state the same care for the lives of its citizens, and the same scrupulous regard for the purity and impartiality of the administration of justice, which is manifested in other states, it is in my opinion clear that the irregularities already commented upon, to say nothing of others to which I have not adverted, are sufficient to entitle the prisoner to a new trial.

But, notwithstanding this conclusion, I think it incumbent upon me to notice that branch of the motion which is founded upon the exceptions taken at the trial.

It appears from the bill of exceptions that the death of Brereton was produced by a blow inflicted by the prisoner with a club, in a sudden affray between the deceased, Edward Brereton, and Daniel Brereton, on the one part, and the prisoner, Eastwood, and one La Rock, on the other.

The evidence of a premeditated design by the prisoner against the life of Brereton, which had the effect to produce a conviction of murder instead of manslaughter, consisted in certain expressions used by the prisoner in the course of the affray. He said a number of times that he would "kill" the deceased; and just before striking the fatal blow, on being told that if he struck the deceased he would kill him, he said, "I mean to kill him;" and shortly after the blow, when told he had killed the man, he replied, "I meant to kill him."

In the course of the trial one Green was called as a witness for the defendant, and testified that he was present at the affray; "that he noticed the prisoner, with whom he was well acquainted; that something ailed him; that he appeared strange and wild, and acted quite differently from his usual manner; that he talked incoherently, and gave answers to

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questions which were foreign to the purpose, and that his breath had the smell of liquor." He further said, that he had been accustomed to see men who were intoxicated.

The counsel for the prisoner then asked the witness whether or not Eastwood, at the time of the affray, was in any degree intoxicated. To this question the district attorney objected, on the ground that it called for the opinion of the witness, and insisted that the witness could only be permitted to give the facts, that is, to describe the appearance and conduct of the prisoner, leaving it for the jury to judge, from this description alone, whether he was intoxicated or not. The court sustained the objection and excluded the evidence, to which the counsel for the prisoner excepted. This exception presents one of the principal grounds upon which the prisoner's counsel relies to obtain a new trial.

That it was of great importance for the jury to know whether the prisoner was or was not intoxicated is obvious. It clearly did not necessarily follow, because the prisoner used the expressions I have referred to, that he really entertained the design which the words import. It not unfrequently happens that, when men are wrought up to a pitch of phrenzied excitement by intoxication or by passion, their language assumes a degree of violence far beyond any deliberate purpose which they have formed. Instances of this kind must have come under the observation of every man of experience. The very affray in question presents one which is strikingly illustrative of the truth here asserted. The companion of the prisoner, La Rock, had been severely beaten and bruised by Brereton, and when afterwards, having armed himself with a club, he struck Brereton a blow which felled him to the ground, he said: "Damn you, you have *killed* me, and I'll *kill* you."

The prominent word here used is the same as that used by Eastwood, and upon the strength of which he was convicted of murder instead of manslaughter; and yet it could

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hardly be contended that, when used by La Rock, it was indicative of an actual design to destroy the life of Brereton. This use of the word "kill," by the companion of Eastwood, and his partner in the affray, together with the frequent use of the same word by Eastwood in the early part of the quarrel, and before his passion had risen to the pitch it afterwards attained, naturally suggest the possibility of a habit existing between the two of using this word as descriptive of a degree of bodily injury less than mortal.

I refer to this simply to show how important it was that the jury, who were to pass upon the delicate question of intent, upon which hung the life of Eastwood, should be possessed of every proper means of judging of his actual condition. If the mental disturbance arising from intoxication was added to that produced by excited passion, it would, of course, have a bearing upon the question to be tried. The evidence offered, therefore, was clearly material, and the question presented is, whether, upon an inquiry as to the intoxication of an individual at a particular time, the opinion of one who was present, and had full opportunity to judge, can be received.

It is a sound general rule, that testimony should consist of facts and not opinions; and this rule is to be departed from only in cases of necessity. As, however, the object of judicial investigations is to ascertain truth, whenever the opinions of witnesses are necessary to enable the jury to form a clear and accurate judgment upon the subject of inquiry, they are to be received. To reject them, under such circumstances, would be to reject the only light by which the jury could be guided to a safe conclusion.

All such cases are exceptions to the general rule, that opinions are not evidence. Upon all questions of science, or those relating to some art or trade, the opinions of experts, *i. e.*, of persons skilled in the particular science, art or trade, are necessarily resorted to; this forms the most prominent and familiar class of exceptions. But the

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authorities show another class, equally well defined, and founded upon reasons no less cogent, although not so universally recognized. I will refer to a few cases belonging to the latter class.

In the case of *McKee v. Nelson* (4 Cow., 355), which was an action for breach of promise of marriage, a witness living with the plaintiff, and having daily opportunities of observing her conduct, was permitted to give his opinion whether the plaintiff was sincerely attached to the defendant.

It has been repeatedly, and, as I think, with the most obvious propriety, held that, upon questions relating to the sanity or mental capacity of the grantor in a deed, witnesses familiar with such grantor, and having the means of judging of his mental condition, may be permitted to give their opinions. (*Culver v. Hoslam*, 7 Barb. S. C. R.; *De Wint v. Barley*, 13 id., 550.) (a)

In *Morse v. The State of Connecticut* (6 Conn., 9), Chief Justice Hosmer held that a witness might be permitted to give his opinion as to the age of an absent person at a particular time, provided he accompanied his opinion by a statement, as far as practicable, of the fact indicative of the age.

The ground upon which opinions are received in all these cases are the same, viz., the impossibility of adequately describing in language those minute facts and appearances upon which a judgment, as to the main act, must necessarily depend.

There are obviously many other cases falling within the same reason, and to which, of course, the same rule should be applied. One such case is very forcibly presented by Gaston, J., in the case of *Clay v. Clary* (2 Iredell L. R., 78). He says: "And so it is in regard to questions respecting the temper in which words have been spoken or acts done:

(a) Overruled. (5 Seld., 871.)

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Were they said or done kindly or rudely, in good humor or in anger, in jest or in earnest? What answer can be given to these "inquiries, if the observer is not permitted to state his impression or belief? Must a *fac simile* be attempted, so as to bring before the jury the very tone, look, gesture and manner, and let them collect therefrom the disposition of the speaker or agent?"

How does the case we are considering differ in principle from the case put by this learned judge. May it not be asked with propriety here, "Must a *fac simile* be attempted, so as to bring before the jury the very tone, look, gesture and manner" of Eastwood, in order to enable them to judge whether he was intoxicated or not? Would it be possible for the jury to judge with any certainty from any mere description which it would be in the power of the witness to give? I think it very clear that they would not. The question put to the witness Green was, therefore, in view of the principles and authorities to which I have referred, improperly overruled; and for this error, as well as on account of the irregularities of the jury, the prisoner is entitled to a new trial.

Judgment reversed and new trial ordered.

SUPREME COURT. New-York General Term, February, 1855.

Mitchell, Clerke and Cowles, Justices.

CHARLES A. PEVERELLY, plaintiff in error, *v.* THE PEOPLE,
defendants in error.

To convict a person of arson in the second degree, under § 2 of art. 1, title 8, chap. 1, of part 4. of the Revised Statutes, by which it is enacted that "every person who shall willfully set fire to or burn, in the night-time, any shop, warehouse or other building, not being the subject of arson in the first degree, but *adjoining* to or within the curtilage of any inhabited dwelling-house, so that such house shall be endangered by such firing, shall, upon conviction, be adjudged guilty of arson in the second degree," it is necessary to prove that the building set fire to actually touched an inhabited dwelling-house, or that it was within the curtilage thereof; *adjoining*, in the section quoted, signifies *actual contact*.

Form of an indictment for an attempt to commit arson in the second degree, by firing a warehouse adjoining to an inhabited dwelling-house.

Form of a record of conviction for felony, where the defendant was tried on an indictment found against him jointly with another person, and to which the defendant pleaded not guilty and demanded a separate trial.

Form of a writ of error to remove a cause, after judgment, from the Court of General Sessions of New-York to the Supreme Court; of the allowance thereof, and of the return thereto.

THIS cause came before the Supreme Court on a writ of error to the General Sessions of New-York, which was as follows:

The People of the State of New-York to the Court of
[L. S.] General Sessions of the Peace, held in and for the
city and county of New-York, Greeting:

Because, in the record and proceedings, and also in the giving of judgment in a certain cause which was in our said court before you, between *The People of the State of New-York* and *Charles A. Peverelly*, who is impleaded with Theodore L. Peverelly, for an alleged attempt to commit arson in the second degree, as is said, manifest error hath intervened to the great damage of the said Charles A. Peverelly,

relly, as he complains; and we, being willing that the error, if any, should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then, without delay, you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching or in any wise concerning the same, to our justices of the Supreme Court, of the State of New-York, for the first judicial district, at the City Hall in the city of New-York, on the first Monday of February next, together with this writ, that, the record and proceedings aforesaid being inspected by our said justices of the Supreme Court, we may cause to be done thereupon, for correcting that error, what of right ought to be done.

RICHARD B. CONNOLLY,
Clerk.

The following allowance was made on such writ by Justice Morris:

December 22d, 1854. ROBERT H. MORRIS.

The answer of the Court of General Sessions to the writ of error was as follows:

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ing or in any wise concerning the same, we certify under the seal of said court to the justices of the Supreme Court, within mentioned, in a certain schedule to this writ annexed, as within it is commanded.

By the Court.

[L. S.]

HENRY VANDERVOORT,
Clerk.

The record of conviction returned was as follows :

City and County of New-York, ss :

Be it remembered, that at a Court of General Sessions of the Peace, holden at the City Hall of the city of New-York, in and for the city and county of New-York, on the first Monday of August, in the year of our Lord one thousand eight hundred and fifty-four, before Francis R. Tillou, Esquire, recorder of the said city of New-York, justice of the said court, assigned to keep the peace of the said city and county of New-York, and to inquire, by the oaths of good and lawful men of the said county, of all crimes and misdemeanors committed or triable in the said county, to hear, determine and punish, according to law, all crimes and misdemeanors in the said city and county done and committed, not punishable with death.

By the oath of Jireh Bull, foreman, and (here follow the names of the grand jurors) it was then and there presented as follows, that is to say :

City and County of New-York, ss :

The jurors of the people of the State of New-York, in and for the body of the city and county of New-York, upon their oath, present: That Charles A. Peverelly, &c., late of the first ward of the city of New-York, in the county of New-York aforesaid, merchant, and Theodore L. Peverelly, late of the first ward of the city of New-York, in

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the county of New-York aforesaid, clerk, on the sixth day of July, in the year of our Lord one thousand eight hundred and fifty-four, at the ward, city and county aforesaid, with force and arms, about the hour of twelve o'clock in the night of the same day, a certain warehouse, of him, the said Charles A. Peverelly, there situate, feloniously and willfully did attempt to set fire to and burn; which said warehouse was then and there adjoining to a certain inhabited dwelling-house of one John Power, he, the said John Power, then and there being within the said dwelling-house, and the said dwelling being endangered by such attempt to set fire to and burn, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Charles A. Peverelly and Theodore L. Peverelly afterwards, to wit, on the day and in the year aforesaid, at the ward, city and county aforesaid, about the hour of twelve o'clock in the night-time of the said day, did, with force and arms, willfully and feloniously attempt to set fire to and burn a certain other building of him, the said Charles A. Peverelly, the same not being a dwelling-house, nor usually occupied by persons lodging there at night; which said building was then and there adjoining to a certain inhabited dwelling-house of one John Murphy, he, the said John Murphy, then and there being within the said dwelling-house, and the said dwelling-house being endangered by such attempt to set fire to and burn, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

Third Count.—And the jurors aforesaid, on their oath aforesaid, do further present: That the said Charles A. Peverelly and Theodore L. Peverelly, on the day and in the year aforesaid, at the ward, city and county aforesaid, with force and arms, about the hour of twelve o'clock in

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the night-time of the said day, a certain warehouse, of him the said Charles A. Peverelly, there situate, feloniously and willfully did attempt to set fire to and burn; which said warehouse was then and there adjoining to a certain inhabited dwelling-house of one Maurice Donovan, he, the said Maurice Donovan, then and there being within the said dwelling-house, and the said dwelling-house being endangered by such attempt to set fire to and burn, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

Fourth Count.—And the jurors aforesaid, on their oath aforesaid, do further present: That the said Charles A. Peverelly and Theodore L. Peverelly afterwards, to wit, on the day and in the year aforesaid, at the ward, city and county aforesaid, about the hour of twelve o'clock in the night-time of the said day, did, with force and arms, willfully and feloniously attempt to set fire to and burn a certain other building of him, the said Charles A. Peverelly, the same not being a dwelling-house, nor usually occupied by persons lodging therein at night; which said building was then and there adjoining to a certain inhabited dwelling-house of one Edward Burke, he, the said Edward Burke, then and there being within the said dwelling-house, and the said dwelling-house being endangered by such attempt to set fire to and burn, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

The eighth count was as follows:

Eighth Count.—And the jurors aforesaid, on their oath aforesaid, do further present: That the said Charles A. Peverelly and Theodore L. Peverelly afterwards, to wit, on the day and in the year aforesaid, at the ward, city and county aforesaid, about the hour of twelve o'clock in the night-time of the said day, did, with force and arms, willfully and feloniously attempt to set fire to and burn a certain building of

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John T. Johnson, the same not being a dwelling-house, nor usually occupied by persons lodging therein at night; which said building was then and there adjoining to a certain inhabited dwelling-house of one Timothy Hassell, he, the said Timothy Hassell, then and there being within the said dwelling-house, and the said dwelling-house being endangered by such attempt to set fire to and burn, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

The eleventh and twelfth counts were as follows:

Eleventh Count.—And the jurors aforesaid, on their oath aforesaid, do further present: That the said Charles A. Peverelly and Theodore L. Peverelly, on the day and in the year aforesaid, at the ward, city and county aforesaid, about the hour of twelve o'clock in the night-time of said day, with force and arms, a certain warehouse, known and described as one hundred and forty-seven Front-street, in the ward, city and county aforesaid, feloniously and willfully did attempt to set fire to and burn; which said warehouse was then and there adjoining to a certain inhabited dwelling-house of one John Murphy, he, the said John Murphy, then and there being within the said dwelling-house, and the said dwelling-house being endangered by such attempt to set fire to and burn, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

Twelfth Count.—And the jurors aforesaid, on their oath aforesaid, do further present: That the said Charles A. Peverelly and Theodore L. Peverelly afterwards, to wit, on the day and in the year aforesaid, at the ward, city and county aforesaid, about the hour of twelve o'clock in the night-time of the said day, did, with force and arms, willfully and feloniously attempt to set fire to and burn a certain other building, known and distinguished as one hundred and forty-seven Front-street, in the ward, city and county afore-

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said, the same not being a dwelling-house, nor usually occupied by persons lodging therein at night; which said building was then and there adjoining to a certain inhabited dwelling-house of one Patrick McCarthy, he, the said Patrick McCarthy, then and there being within the said dwelling-house, and the said dwelling-house being endangered by such attempt to set fire to and burn, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

L. B. SHEPARD,
District Attorney.

And the said Charles A. Peverelly afterwards, to wit, on the eleventh day of August, in the year of our Lord one thousand eight hundred and fifty-four, at the place last mentioned, before the said justice above named, came in his own proper person, and being brought to the bar here in his own proper person, and arraigned upon the said indictment, and having heard the said indictment read, and being asked whether he demanded a trial upon the said indictment, answers that he does require a trial thereon, and says that he is not guilty thereof, and demands that he be tried upon the said indictment separately from the said Theodore L. Peverelly; and thereupon, for good and ill, is put upon the country.

And Lorenzo B. Shepard, Esquire, district attorney for the city and county of New-York, who prosecutes for the people of the said State of New-York, in their behalf doth the like.

And afterwards, to wit, at a Court of General Sessions of the Peace, held in and for the said city and county of New-York, at the City Hall of the said city, on the thirteenth day of November, in the year of our Lord one thousand eight hundred and fifty-four, before Welcome R.

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Beebe, city judge of the city of New-York, and justice of the said court, comes the said Charles A. Peverelly, and the said Loranzo B. Shepard, Esquire, district attorney, likewise comes. Therefore let a jury thereupon immediately come before the justice last above mentioned, of free and lawful men of the said city and county, each of whom hath, &c., by whom the truth of the matter may be better known, and who are not of kin to the said Charles A. Peverelly, to recognize, upon their oath, whether the said Charles A. Peverelly be guilty of the felony in the indictment aforesaid above specified, or not guilty.

And the jurors of the said jury, by John Orser, Esquire, sheriff of the city and county of New-York, for this purpose empaneled and returned, to wit: Henry Barnard, William Jones, Daniel W. Devoe, David Griffiths, Francis A. Tiffany, Lawrence Dufour, James T. Stratton, Henry C. Ball, George J. Penchard, John W. Kilsby, Stephen Robert, Edward O. Jenkins; who, being called, come; and who being then and there elected, tried and sworn, well and truly to try and true deliverance make between the people of the State of New-York, and the said Charles A. Peverelly, then at the bar, whom they should have in charge upon the said indictment, and a true verdict give according to evidence; who, upon their oath aforesaid, say, that the said Charles A. Peverelly is guilty of the felony above charged in the form aforesaid, as by the indictment aforesaid is above alleged against him.

And upon this, it is demanded of the said Charles A. Peverelly whether he hath or knoweth anything to say wherefore the said justice here ought not, upon the premises and verdict aforesaid, to proceed to judgment against him, who nothing further saith, unless as before he has said. Whereupon, all and singular the premises being seen, and by the same justice here fully understood, it is considered by the said justice that the said Charles A. Peverelly, for the felony aforesaid, be imprisoned in the

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state prison, at hard labor, for the term of four years and six months.

LORENZO B. SHEPARD,
District Attorney.

Judgment signed this 28th day }
of December, 1854. }

W. R. BEEBE, *City Judge.*

By the bill of exceptions, also returned with the above record of conviction, it appeared that the prisoner, having pleaded not guilty and demanded a separate trial, was tried before Judge Beebe, city judge, on the 9th of November, 1854. It appeared, upon the trial, that the warehouse, which it was alleged the prisoner had attempted to set fire to, was not in actual contact with the inhabited dwelling-house of either of the persons named in the indictment, but was only four or five feet distant.

The defendant's counsel, among other things, requested the court to charge as follows :

That dwellings, to be adjoining to the warehouse or building of the defendant, within the statute, must actually touch, or be in close contact with the latter building ; that the word "adjoining" meant actual contact, and that unless the dwellings mentioned in the testimony for the prosecution were in actual contact with the defendant's building, the indictment was unsustainable in this particular.

The court refused so to charge, and the defendant's counsel excepted.

There were several other questions which arose on the trial, but they need not be stated, as no opinion was expressed upon them by the Supreme Court.

John Graham, for the plaintiff in error, made, among other points, the following :

VI. The definition of the word "adjoining," as given in the request of the court to charge the jury, was correct, and

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the refusal of the court so to charge, and its charge, as given upon this point, were erroneous.

The statute uses language that has a perfectly well understood meaning. The building attempted to be fired must adjoin, or, if not adjoin, must be within the curtilage of an inhabited dwelling. In other words, the former building must touch the latter, or if it does not, and is removed any distance from the latter, it must be within the common fence. To take this as the standard by which to construe the statute is to assume a safe one. Any other would be productive of the greatest laxity. But for the exertions which are made to arrest fires, any building on fire, or attempted to be set on fire, could be said to adjoin another, for the purposes of danger, no matter how far off the two buildings might be.

The error of the court was, in allowing the jury to define for themselves the word "adjoining," with reference to distance. No two juries would think alike on such a subject. Some might take a greater and some a less distance.

It must be observed, too, that this is a penal statute, and as such to be strictly, literally construed. (4 *Bl. Com.*, 225; 1 *Mood. & Malk.*, 341; *S. C.*, 22 *Eng. Com. L. R.*, 330; 3 *Chitty's Cr. L.*, 1129 (5th *Am. ed.*).

A. Oakley Hall (District Attorney), for the defendants in error.

VII. The evidence answered the meaning of the words "adjoining to:" First. By definition of the words; Second. By context of the same section of the statute; Third. According to the terms of the decision in *The People v. Gates* (15 *Wend.*, 160).

CLERKE, J. The principal question in this case depends upon the legal signification of the term "adjoining."

The word is derived either immediately or mediately through the French from the Latin language. The Latin word "*adjungo*," from which it has sprung, signified "to

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join to:" but the etymology of a word would be an uncertain guide to its present popular or even technical meaning. Not only words of classical and foreign origin, but those indigenous to the Anglo-Saxon stock, have, in many instances, widely departed from their primitive acceptation, and, in some instances, have been transformed into one entirely opposite and dissimilar. The word "prevent" may be cited, among many others of a similar history. It is derived from the Latin "*prævenio*," "to go before," and, in our translation of the Bible, in the liturgy, and in old theological standards, it is employed to express the idea of "assisting" and "going before." At present it means "hindrance," "impediment," and is used in no other sense.

The word "adjoin" seems popularly to have no fixed meaning. I have no doubt that it is frequently employed in ordinary language merely to express nearness; but there are no indications, in the instances in which it is more formally used, that its present signification is at all different from that of its Latin original.

Mr. Crabbe, in his *English Synonyms*, classifies together "adjacent," "adjoining" and "contiguous;" and, after giving the etymology of these words, illustrates the difference between them in the following manner: "What is *adjacent* may be separated by the intervention of some third object: 'They have been beating up for volunteers at York, and the towns *adjacent*, but nobody will list.' *Granville*. What is *adjoining* must touch in some part: 'As he happens to have no estate *adjoining*, equal to his own, his oppressions are often borne without resistance.' *Johnson*. What is *contiguous* must be fitted to touch entirely on one side: 'We arrived at the utmost boundaries of a wood, which lay *contiguous* to a plain.' *Steele*. Lands are *adjacent* to a house or town; fields are *adjoining* to each other; houses *contiguous* to each other."

In the case of *Rex v. Hodges* (1 *Mood. & Malk.*, 341), this meaning was given to the word "adjoining," in a case not unlike the present. The prisoner was indicted, on the 7th

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and 8th George IV. (ch. 29, § 38), for stealing pear trees, described, in one of the counts of the indictment, as growing on ground "adjoining," &c., to a dwelling-house; held, "adjoining" imported "actual contact," and, therefore, ground separated from a house by a narrow walk and paling, with a gate in it, was not within the meaning of the act.

One of the statutes under which the prisoner in this case was indicted provides that "every person who shall willfully set fire to or burn in the night-time any shop, warehouse or other building, not being the subject of arson in the first degree, but *adjoining* to, or within the curtilage of, any inhabited dwelling-house, *so that such house shall be endangered by such firing*, shall, upon conviction, be adjudged guilty of arson in the second degree." The court below were of opinion that the words, "*so that such house shall be endangered by such firing*," were sufficient to show that the statute meant any house near enough to be endangered. It must be admitted that there is some force in this view, as these words appear to be superfluous if the word "adjoining" signified only a house in actual contact with the place set fire to; for every house in actual contact, it may be alleged, must necessarily be endangered by such an act; but if such a qualification of the word "adjoining" were to be accepted, it would give the term a much more extended signification than the prosecution contends for or than the court below evidently intended. It would be impossible to limit, in a city, the distance in which any house may not be endangered when any other building in it is on fire; the danger would depend upon the combustibleness of the intervening houses, the preparations of the incendiary, the state of the weather, and the means of suppressing the original fire or of arresting its progress.

Even if these words, therefore, cannot be applied to any other antecedent, it is safer to consider them as surplusage, than to give them the effect of changing a term from its well established and recognized signification.

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I am of opinion that the court below erred in its charge to the jury on this point, and that a new trial should be granted.

MITCHELL, P. J. The act under which the defendant was indicted provides (omitting some words not now material) that every person who shall willfully set fire to or burn, in the night-time, any building not being the subject of arson in the first degree, but adjoining to or within the curtilage of any inhabited dwelling-house, so that such house shall be endangered by such firing, shall be guilty of arson in the second degree.

The building set fire to by the defendant was a store and not inhabited, and did not touch any inhabited house, nor was it within the curtilage of any, but was in a block where there were several dwelling-houses; two of them, each, on another lot; and not more than ten or twenty feet from the store. The act may admit of two constructions: one, that it applies to a person who shall so set fire to or burn a building, &c., adjoining an inhabited house, that such adjoining house shall be endangered by such fire; the other, that it applies to a person who sets fire to a building, &c., which so adjoins a dwelling-house that the dwelling-house is endangered by the fire.

If this construction were right, then the sentence would read, that the person should be guilty who should set fire to a building, &c., so adjoining to or so within the curtilage of any inhabited dwelling-house that such house should be endangered by such fire; and the "so" must then qualify the term "within the curtilage," as well as the term "adjoining."

There could be no need of thus defining the meaning of being "within the curtilage;" that was already sufficiently understood, and this makes it probable that the term "so" was meant not to qualify the words "adjoining," or being "within the curtilage," but the verbs "shall set fire to or

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burn." If the prisoner should set fire to or burn a store, in such a manner that he endangered an inhabited dwelling-house, adjoining to or within the same curtilage as the store, by such fire, then he was to be deemed guilty. But if he set fire to the store in such manner that the adjoining dwelling-house was not in danger by such fire, then he was not guilty under this section.

This being the proper reading of the section, the question remains, what does "adjoining to" mean in this act. In addition to what my brother, Clerke, has said on that subject, it may be proper to refer to 2 *Revised Statutes* (p. 657, § 10), which, after arson in the first degree is defined in section nine, declares that no warehouse, outhouse, &c., shall be deemed a dwelling-house, or part of a dwelling-house, within the meaning of the preceding section, unless the same be joined to, immediately connected with, and part of a dwelling-house.

If this store and the two dwelling-houses near them had been separated as they are, and had been used as parts of a hotel, and no one ever slept in this store, or was in it when it was set on fire, could it, by possibility, have been held that the defendant was guilty of arson in the first degree, and that this store joined to and was immediately connected with it for the purposes of the hotel, and to which it was applied, although not by contact, but it would not be joined to it. If the terms, "joined to and immediately connected with," both refer to the position of the building, and not to the uses to which they are applied, as is probably correct, then each helps to define the other, and to show that both were used, as well as the words "part of the dwelling-house," so as, by an accumulation of words of nearly the same meaning, to secure the construction which each phrase was intended to have, an actual contact.

The term "adjoining" is used in its strict sense, as indicating actual contact, in the law as to division fences (1 *R. S.*, 563, §§ 30, 31, 33), and in section four hundred and one of the

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Code, prescribing the counties in which motions shall be made, and probably in other statutes.

The offence of the defendant is so great that it is quite natural an effort should be made to bring him within the section under which he is convicted; but the court is not at liberty to go beyond the fair meaning of the legislature in a highly penal statute.

A new trial should be granted.

Judgment reversed and new trial ordered.

SUPREME COURT. Albany General Term, December, 1855. *Parker, Wright and Watson*, Justices.

THE PEOPLE v. JAMES CARROLL.

On a complaint against a person as a disorderly person, if the charge be sustained, a magistrate may require sureties for good behavior for one year, and, in default of such sureties being given, may commit to jail; but he cannot proceed to organize a court of special sessions, and, on conviction, punish the accused by fine and imprisonment.

To warrant a conviction as a disorderly person, the complaint must bring the case within some of the specifications enumerated in the statute as constituting the offence.

On a trial before a court of special sessions, a party cannot object that an answer to the question asked may involve the witness in a criminal prosecution. Such an objection can only be made by the witness. Nor can a witness claim such a privilege, where the answer is necessary to a full understanding of the facts already voluntarily stated by the witness, although the answer may tend to criminate the witness.

If a witness has testified to a part of a transaction or of a series of transactions which implicate the accused, the latter has a right to show, by a cross-examination of the same witness, that the criminality was on the part of the witness and not of the accused.

Forms of complaint and warrant before a magistrate, and of a *certiorari* to remove proceedings after conviction before a court of special sessions.

THIS cause came up on *certiorari* to a court of special sessions. The writ was allowed on affidavit, and was in the words following:

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The People of the State of New-York to Alexander Frink,
[L. s.] Esq., a justice of the peace of the county of
Albany, Greeting :

We, having been informed that James Carroll of said county was lately, in a Court of Special Sessions of the Peace, held before you, convicted of disorderly conduct in abandoning his wife ; and being willing, for certain causes, to be certified of the said conviction, and of the complaint, proceedings and judgment against the said James Carroll, do command you that the said complaint, proceedings, evidence, conviction and judgment, with all things touching the same, by whatsoever name the party may be called therein, you send to our justices of our Supreme Court, distinctly and plainly under your hand and seal, and that you cause this writ and the affidavit delivered to you therewith, and your return, to be filed, in the office of the clerk of our Supreme Court of Judicature at Albany, within twenty days after the service of this writ.

Witness, Amasa J. Parker, presiding justice of our said court, at Albany, the fifth day of June, A. D. 1855.

R. HARPER, *Clerk.*

D. McElwain, for the defendant.

To this writ the justice made the following return :

Albany County, ss :

The undersigned justice of the peace, named in the annexed writ, hereby certifies and returns to the Supreme Court: That James Carroll, of said county, was, on the 30th day of May, 1855, brought before him by virtue of the warrant hereto annexed, marked A, which was issued upon the complaint, on oath and in writing, of Frances Carroll, the wife of the said James Carroll, which is hereto annexed, marked B ; and that the said James Carroll, after having been required by him, omitted, for twenty-four hours there-

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after, to give bail for his appearance at the next criminal court having cognizance of said offence, and thereupon the undersigned, on the 1st day of June, 1855, at his office, in the village of Cohoes, in said county, duly organized a Court of Special Sessions, for the trial of the said James Carroll for the offence specified in said complaint and warrant; and the said court having been organized, the undersigned caused the said James Carroll to be brought before him for trial; and the charge made against the said James Carroll, as stated in said complaint and warrant, was then and there distinctly read to him, and he was required to plead thereto, and the said James Carroll plead thereto not guilty, which plea the said court entered on his minutes. The counsel for the said James Carroll then moved that the prisoner be discharged, on the ground that the affidavit and complaint on which the warrant was issued cannot be made by the wife against her husband. Defendant's counsel then moved that the prisoner be discharged, on the further ground that there was no law authorizing his arrest on the complaint before the court. Both these motions were denied, and the prisoner's counsel excepted. And the said James Carroll having demanded to be tried by a jury, a *venire* was issued according to the statute in such case made and provided, and a jury duly and legally summoned, drawn, tried and sworn; and the jury sat together and heard the proofs and allegations in the case, which were delivered in public, and in the presence of the defendant.

Frances Carroll, the wife of the defendant, was offered as a witness on the part of the people, to which the defendant's counsel objected, on the ground that she was the wife of the defendant. The undersigned overruled the objection, and the witness then, being duly sworn and examined, testified as follows:

I reside in Cohoes, Albany county and State of New-York; am the wife of the defendant; I have lived with the defendant some fifteen years as his wife; I have had eight children by the defendant, four of which are still living; I

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am not now living with the defendant, for he has turned me out of doors, or out of his house; I am now living with strangers; I was turned out of defendant's house on the 23d day of August, 1854; I was arrested, at the instance of the defendant, and taken before Justice Phelps; I do not know what I was arrested for; I was sent to jail.

Question. How long did you remain in jail?

Objected to by defendant's counsel, on the ground that the justice's docket is higher evidence, and should be produced, and not proved by parol. Objection sustained, and witness proceeded as follows:

After I came out of jail, I went to Mr. Bortel's; Mr. Bortel called on the defendant and asked him to pay my board, and the defendant refused; I have called upon the defendant since that time, and tried to live with him, and he told me to go out of his house, and he said he hoped God would strike him dead if he ever lived with me one night in his house; this conversation took place in the defendant's store; the defendant said he would have me arrested if I did not leave the store; I have called on the defendant several times for money to pay my board, and he refused to do so; I have asked the defendant several times, and also asked him to let me see my children, and he always refused to let me see one of them; I have also called repeatedly on the defendant for my clothes, and he has refused to let me have them.

The docket of Justice Hubbard was here introduced in evidence, which showed that the defendant had been arrested, tried and convicted on a charge of disorderly conduct, and abandonment of his wife, and sentenced to the penitentiary for the space of thirty days, on the 27th day of October, 1854.

The witness was then questioned further, and answered as follows: Defendant has put me out of his store repeatedly; I went into defendant's store with several ladies, when defendant took me by the shoulders and pushed me out; defendant has not pushed me out within the last three weeks, but has

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ordered me out; defendant has neglected to pay board; it is three weeks to-day since the defendant paid my board; he has repeatedly refused to give me my clothes; I have asked him repeatedly for money to pay my board, but he has refused to furnish it; he keeps two women, that live with him part of the time; since I left, defendant has had three women with him; I have no way of getting a living; I have been at work in a factory, but have been discharged; I have applied to the overseer of the poor several times for relief; he refused to grant me relief; I am now dependent for a living on the inhabitants of this village.

The witness was then *cross-examined*, and testified as follows: The name of the girl with whom the defendant took improper liberties is Maria Kimey.

Question, by defendant's counsel: Did you threaten to poison or destroy the defendant and his children?

Plaintiff's counsel objected, because: First. It would involve the witness in a criminal prosecution; Second. It is not explicit, and is irrelevant unless it has been shown to have been done within the last three weeks. Objection sustained; defendant's counsel excepted.

Question. Did you not threaten to set the store on fire, and burn up the goods, when the defendant went to New-York?

Plaintiff's counsel objected, because: First. It is irrelevant; Second. It is not explicit; Third. The witness is exonerated from answering it; for, if answered, it would involve her in a criminal prosecution. Objection sustained; defendant's counsel excepted.

Question. Did you not throw a kettle of hot water on defendant when he was coming up stairs to get his breakfast?

Plaintiff's counsel objected, because: First. It is irrelevant; Second. It would involve plaintiff in a criminal prosecution. Objection sustained; defendant's counsel excepted.

Question. Did you not throw a pan of coals and ashes on defendant's head as he was coming up stairs to get his breakfast, at another time?

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Objection sustained; same decision as above; defendant's counsel excepted.

Question. Did you not lock up one of the children in a dark room, and refuse to let defendant see it, or to provide food for it, or have it nursed, so that it came near being starved to death? This was the youngest child.

Objected to, because it is irrelevant, unless it is shown to have been done within the last three weeks. Objection sustained; defendant's counsel excepted.

Question. Did you not tear up two or three dresses which defendant gave you when you left?

Objected to as irrelevant. Objection sustained; defendant's counsel excepted.

Question. Did you not tell the defendant that you meant to be as ugly as you could be, in order to make defendant drive you away, and so that you could make him support you?

Objected to as irrelevant. Objection sustained; defendant's counsel excepted.

The defendant has four children. The eldest is eight years of age, the next youngest is between five and six years of age, the next youngest between three and four years of age, and the youngest is two years of age.

Question. Did you not threaten to leave the defendant and go to work in the factory, since the birth of the youngest child, or last fall?

Objected to as irrelevant. Objection sustained; defendant's counsel excepted.

Defendant takes care of his children, and supports them since the separation, and does so now.

Henry C. Conde was next sworn for the people, and testified as follows: I heard the defendant say, during the conversation, that he was paid fifty dollars a month for tending that store.

On his *cross-examination*, he testified as follows: I am attorney in this case, on the part of the people; defendant

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might have said that it took all that to support his children and himself, and pay house rent, and hire nurses, and for clothing.

The foregoing is substantially all the testimony given in the said cause when the testimony was closed. The defendant's counsel moved to have the prisoner discharged, on the ground that the act of the legislature in relation to the village of Cohoes, passed July 1st, 1851, and under which these proceedings have been had, has been repealed by the act passed in 1855. This motion was denied, and the case was submitted to the jury, who, after hearing the said proofs and allegations, retired, and were kept together in a convenient place, under the charge of a constable duly sworn for that purpose, until they had agreed upon their verdict. And the said jury, when they had agreed upon their verdict, came into the said court, and delivered the same publicly, and by such verdict they found the said James Carroll guilty of the offence wherewith he was charged as aforesaid. Whereupon the said James Carroll was remanded into the custody of the constable, and the court was adjourned until the second day of June, instant, at nine o'clock, A. M., at which time he was again brought into court. Whereupon the said court did adjudge and order that the said James Carroll should pay a fine of twenty-five dollars, or be imprisoned in the penitentiary of Albany county for ninety days.

All which the undersigned sends, as by the said writ he is commanded.

Dated at Cohoes, this 1st day of August, 1855.

ALEXANDER FRINK, [L. S.]
Police Justice.

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SCHEDULE A.

ALBANY COUNTY, }
Town of Watervliet, } ss &

To the Sheriff or any Constable of said County, Greeting :

Whereas complaint, on the oath of Frances Carroll, has been made before the undersigned, justice of the peace and police justice of said town, on the 30th day of May, 1855, at Cohoes, in said county, that James Carroll is her husband, and that he has abandoned her at Cohoes, Albany county ; that he neglects and refuses to provide for her according to his means, and that he has for two weeks last past, at Cohoes, refused to pay her board and to support her ; that he has, for several months last past, refused to permit her to reside with him and to associate with her children ; and that he retains her clothing and refuses to let her have the same, and is a disorderly person within the intent and meaning of the statute.

These are therefore, in the name of the people of the State of New-York, to command you forthwith to take the said James Carroll, and to bring him before me, at my office in said town, to answer unto the matter contained in said complaint, and to be further dealt with according to law.

Dated at said town, the 30th day of May, 1855.

A. FRINK,

Police Justice and Justice of the Peace.

SCHEDULE B.

ALBANY COUNTY, ss :

Frances Carroll, of Cohoes, in said county, being duly sworn, says : That James Carroll is her husband, and that he has abandoned her at Cohoes, Albany county ; that he neglects and refuses to provide for her according to his means ; that he has for two weeks last past, at Cohoes, refused to pay her board and to support her ; that he has, for several months last past, refused to permit her to reside

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with him and to associate with her children, and he retains her clothing and refuses to let her have the same, and is a disorderly person within the intent and meaning of the statute. She therefore prays that the said James Carroll may be arrested and dealt with according to law.

FRANCES CARROLL.

Sworn to before me, this 30th }
day of May, 1855. }

ALEX. FRINK, *Justice and Police Justice.*

D. McElwain, for the defendant.

I. The justice erred in not discharging the prisoner, as Frances Carroll, the wife of the prisoner, could not make an affidavit in this case on which the defendant could be arrested, nor could she be a witness against her husband in any case, except where he threatens or commits personal violence. (*Barb. Cr. L.*, 383-452, *ed. of 1841*; 2 *Kent's Com.*, 178, 9, *ed. of 1844*; *The People v. Carpenter*, 9 *Barb.*, 580; 2 *Bright on Husb. and Wife*, 42, *ed. of 1850*; 1 *Phil. Ev.*, ch. 5, § 3, p. 71, 9th. *ed.*)

II. The justice erred in not discharging the prisoner on motion of defendant's counsel, as the complaint was made and prosecuted under an act to amend the act incorporating villages, so far as relates to the village of Cohoes, passed July 1st, 1851. (*Laws of 1851*, 675, § 7); which act was repealed by an act passed April 12th, 1855. (*Laws of 1855*, 631, § 97.)

III. The justice erred in excluding the evidence on the cross-examination of Frances Carroll.

IV. The defendant could not be twice tried and punished for the same offence.

V. It cannot be said that the complaint was received under the Revised Statutes, as there is nothing in the complaint or proof showing that the defendant threatened to

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run away, and leave his wife or children a burden on the public. (1 R. S., 819, *ed. of 1846.*)

H. Harris (District Attorney), for the people.

By the Court, PARKER, J.—This case abounds in error. The complaint charged against the defendant no crime or misdemeanor which courts of special sessions are authorized to try. (2 R. S., 711.) It was only, at most, a complaint against him as a disorderly person, and, if enough was set forth, it was the foundation for a summary proceeding under 1 *Revised Statutes*, 819. If, on the return of the warrant, it had appeared by the confession of the defendant, or by competent testimony, that the defendant was a disorderly person, as charged, the justice might have required sufficient sureties for his good behavior for one year, in default of which he might have committed him to jail; and this was all he could do. But the justice, mistaking entirely his powers and the character of the offence, organized a Court of Special Sessions, required the defendant to plead to the complaint, and, after the trial, sentenced him to pay a fine of twenty-five dollars, or be imprisoned in the penitentiary of Albany county for ninety days.

It is even doubtful whether there was enough in the complaint, if established, to convict the defendant of being a disorderly person. The charge was that he had abandoned his wife, and neglected and refused to provide for her, and that for two weeks he had refused to pay her board and support her, and that he had refused for several months to permit her to reside with him and to associate with her children, and retained her clothing and refused to let her have the same, and that he was a disorderly person. None of these specifications come within those enumerated in the statute. (1 R. S., 638.) The statute declares those to be disorderly persons who threaten to run away and leave their wives or children a burden to the public. No threats are

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alleged in this case. The complaint was evidently drawn under the seventh section of the act of 1851, amending the charter of the village of Cohoes (*Laws of 1851, 577*), which declared all persons who should actually abandon their wives and children in said village, or who should refuse or neglect to provide for them, &c., to be disorderly persons. But that act was repealed on the 12th of April, 1855 (*Laws of 1855, 663*), more than a month before these proceedings were instituted.

Without deciding the question whether the wife of the defendant was a competent witness against him, in a case where no personal violence was alleged (*The People v. Carpenter, 9 Barb., 580*), it is quite certain that the justice excluded proper testimony on the cross-examination. The defendant's counsel had a right, after hearing her statement of the conduct of the defendant, to require her to answer further such questions as tended to show that her own conduct had provoked, or that it justified, the conduct of the defendant. A party cannot object that an answer to the question asked may involve the witness in a criminal prosecution. Such an objection may be made by the witness, but not by the party; nor can even a witness claim such a privilege where such further examination is necessary to understand the facts already voluntarily stated. If a witness has stated a part of a transaction, or of a series of transactions, which implicate the defendant, the latter has a right to show, by a cross-examination of the same witness, that the fault and even the criminality were on the part of the witness and not of the accused. (*1 Cow. & Hill, 734, 5.*)

The conviction must be reversed.

Conviction reversed.

COURT OF APPEALS. Albany, June Term, 1855. Before *Gardiner*, Chief Judge, and *Denio, Johnson, Ruggles, Dean, Hand, Crippen* and *Marvin*, Judges.

THE PEOPLE, plaintiffs in error, *v.* ANDREW WILLIAMS, defendant in error.

When it is necessary, on the trial of a cause, to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it is admissible in evidence, as part of the *res gesta*, for the purpose of showing its true character; but to render such declaration competent, the act with which it is connected should be pertinent to the issue; for when the act is, in its own nature, irrelevant, and when the declaration is, *per se*, incompetent, the union of the two will not render the declaration admissible.

Where, on the trial of A. W. for the alleged murder of his wife by poison, it appeared that he lived apart from his wife, and in the same town, and that his wife left her residence, on Saturday evening before her death, and returned home, at five o'clock the next morning, sick, and continued ill till she died, her symptoms being the same as in cases of poisoning; *Held*, That it was not competent to prove what the deceased said, when she left home on Saturday evening, as to where she was going; and where such evidence was admitted, and it was proved that she said she was going with clothing for her husband, and the prisoner was convicted, it was *held* erroneous, and the judgment was reversed.

Where it was claimed by the prosecution that arsenic had been administered to the deceased, in a bowl in which there had been tea and toast, which had been fed to her from the bowl by the prisoner, during her last illness, and there was evidence tending to identify the bowl as the same one delivered to the physician who had analyzed the contents at the request of the prosecution; *Held*, That it was competent for the prosecution, at the trial, to prove by the physician the condition and contents of the bowl, and the analysis made by him of the contents, though the identification of the bowl by the witnesses was not positive, it being a question for the jury to decide whether the bowl was identified to their satisfaction.

On such a trial, it is proper, on the question of motive, to prove that the wife had, sometime previous to the alleged poisoning, entered a complaint against her husband, the prisoner, as a disorderly person, on the ground that he had abandoned his wife, and that the prisoner was arrested on such complaint, and gave a recognizance, with surety, on which he had been required to pay, and had paid, to the magistrate, weekly, the sum of \$2 for the support of his wife.

Where a paper, claimed to be such a recognizance, was produced in court, which purported to be signed by the prisoner and his surety, and to have been taken before a police justice, but had never been filed, and there was

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no evidence of its execution, except what might be inferred from the testimony of an agent of the governors of the alms-house who produced it, that weekly payments of \$2 had been made on it by the prisoner; *Held*, That there was not sufficient proof of its execution to allow it to be read in evidence. By HAND and MITCHELL, JJ.

Where an inquiry into the condition of a person's health is material, any account given by such person relative to his health is evidence of complaints and symptoms; but it is not evidence to charge any other person as the cause of those sufferings. By CLERKE, J.

To authorize any further proof of the statements and declarations made by a person during his last illness, it is necessary to show that they were made under the apprehension of death, and that the deceased was conscious of approaching and inevitable death; and it is not necessary that such consciousness should be uttered in express terms, but it may be inferred from the tenor of his conversation, the nature of his sufferings, and his whole demeanor. By CLERKE, J.

Form of an indictment for murder by poison, and of a certificate of a justice of the Supreme Court allowing a writ of error and staying proceedings.

Symptoms of poisoning by arsenic, as described by witnesses and proved by a physician.

Mode of conducting a *post mortem* examination in such a case, as described by a physician.

THIS case came before the Court of Appeals on writ of error to the Supreme Court, sued out by the district attorney of the city and county of New-York. By the return it appeared that in May, one thousand eight hundred and fifty-four, an indictment for murder, in the following form, was found against the defendant in the New-York General Sessions.

City and County of New-York, ss:

The jurors of the people of the State of New-York, in and for the body of the city and county of New-York, upon their oath, present: That Andrew Williams, late of the first ward of the city of New-York, aforesaid, laborer, of his malice aforethought, wickedly contriving and intending one Rose Williams, with poison, willfully, feloniously and of his malice aforethought, to kill and murder, on the twenty-ninth day of April, in the year of our Lord one thousand eight hundred and fifty-four, at the ward,

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city and county aforesaid, with force and arms, a certain quantity of arsenic, to wit, two drachms of arsenic, being a deadly poison, feloniously, willfully and of his malice aforethought, did infuse, mix and mingle in and together with a certain quantity of liquor (to the jurors aforesaid unknown), he, the said Andrew Williams, then and there well knowing said arsenic to be a deadly poison. And the said Andrew Williams afterwards, to wit, on the day and in the year aforesaid, at the ward, city and county aforesaid, the poison aforesaid, so as aforesaid infused, mixed and mingled with the said liquor (to the jurors aforesaid unknown) aforesaid, feloniously, willfully and of his malice aforethought, did give and administer to her, the said Rose Williams, to take, drink and swallow down into her body; and she, the said Rose Williams, not knowing the poison aforesaid to have been mixed and mingled as aforesaid, afterwards, to wit, on the day and year aforesaid, at the ward, city and county aforesaid, the said poison, so as aforesaid mixed and mingled, by the persuasion and procurement of the said Andrew Williams, did take, drink and swallow down into her body. And thereupon the said Rose Williams, by the poison aforesaid, so mixed and mingled, as aforesaid, by the said Andrew Williams, and so taken, drank and swallowed down into her body, as aforesaid, became then and there sick and distempered in her body; and the said Rose Williams, of the poison aforesaid, and of the sickness and distemper occasioned thereby, from the said twenty-ninth day of April, in the year last aforesaid, until the fourth day of May, in the last year aforesaid, did languish, and languishing did live. On which said fourth day of May she, the said Rose Williams, at the sixth ward of the city and county aforesaid, of the poison aforesaid, and of the sickness and distemper thereby occasioned, as aforesaid, died.

And the jurors aforesaid, upon their oath aforesaid, do say, that the said Andrew Williams, her, the said Rose

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Williams, in manner and form, and by the means aforesaid, then and there feloniously, wilfully and of his malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Andrew Williams, afterwards, to wit, on the third day of May, in the year of our Lord one thousand eight hundred and fifty-four, at the sixth ward of the city and county aforesaid, wickedly, feloniously and of his malice aforethought contriving and intending one Rose Williams to kill and murder, with force and arms, in and upon the said Rose Williams, then and there being, feloniously, wilfully and of his malice aforethought, did give and administer unto the said Rose Williams, with intent that she should take and swallow the same into her body, he, the said Andrew Williams, then and there well knowing the said arsenic to be a deadly poison. And the said Rose Williams the said arsenic, so given and administered unto her by the said Andrew Williams as aforesaid, did take and swallow down into her body, by reason and by means of which said taking and swallowing down of the said arsenic into her body, as aforesaid, the said Rose Williams became and was mortally sick and distempered in her body, of which said poisoning and mortal sickness and distemper the said Rose Williams, on the fourth day of the same month of May, in the same year aforesaid, at the ward, city and county aforesaid, died.

And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said Andrew Williams the said Rose Williams, in manner and form aforesaid, feloniously, wilfully and of his malice aforethought did kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

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The indictment was sent to the New-York Oyer and Terminer, where the defendant pleaded not guilty; and the issue thus joined came on to be tried in such Court of Oyer and Terminer on the eighteenth May, one thousand eight hundred and fifty-four, before the Hon. James J. Roosevelt, one of the justices of the Supreme Court.

The district attorney, in his opening, stated that Rose Williams, the deceased, came to her death by poison (arsenic) administered to her by the prisoner, her husband, on the night of Saturday, the 29th day of April, 1854, and on the evening of Wednesday, the 3d day of May, 1854.

The following testimony was then taken :

Mary Campbell, being sworn, testified: I resided on the first of May last in No. 58 Duane-street; I had been there prior to that three months; I knew the deceased for about a year; we then lived together at No. 28 City Hall-place; we left there and immediately came to Duane-street. Mrs. Williams was with me four months, from February up to her death; I knew her husband; deceased and her husband did not live together; they have not lived together since I became acquainted with her; the last Saturday before her death, she left my house with clothing for her husband (who was a watchman on some ship in the North river), as she said.

This was said in answer to a question by the district attorney, who asked the witness to state where the deceased said she was going on Saturday evening previous to her death. The prisoner's counsel objected to the question, but the court overruled the objection, and the defendant excepted. The witness proceeded:

She did not return until five o'clock the next morning; when she came in she appeared very ill; she said she got sick on board the vessel on which her husband was; she said she had not been drinking; she said that her whole frame seemed as if it were on fire, and her heart felt awful, On the day she returned her husband called to see her, and

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she was in bed; when he came in she was so glad to see him that she rose up and put on some of her things; she then gave me fifty cents and told me to go out and get her some apples and candies. When he came in the wife told him that I had said she had been drinking some liquor, and he said she had not been drinking anything; I then went out for the things and brought them in and gave them to the deceased, and the deceased gave them to the prisoner; I was absent about five minutes; I put the apples and candy on the trunk, and deceased handed them to him; she vomited during the whole Sunday, both day and night; and when she took any water, which she was continually calling for, she brought it up; he did not stop very long on Sunday; I did not notice their conversation particularly; on Monday, a little before two o'clock, the doctor came; the prisoner was there on Monday in the afternoon; he told her then that he had left \$10 at the City Hall for her, to pay her weekly allowance; he said that he would call again, and did so on the Monday evening at eight o'clock; she was no better then, and was vomiting all the time; she told him that she had "felt awful" ever since she had tasted what he had given to her in a pitcher; he then told her it was the water she had drank that made her feel so bad; she then asked for some water, and he would not let her have any; she then told him to leave, but he said there was time enough; he then went down stairs and brought up some butter, a loaf, and some sponge cake; he ate most of it himself; he offered her some, but she would not eat it; she was frequently asking for water, but he would not let her have any; she then asked him to lie down, when he would not go; it was a far advanced period of the night at this time, and he would not leave, so that he should prevent her from getting water; he laid down; I slept in the same room; he remained all night; she, during the night, wanted water, and he seemingly would be asleep, and when she attempted to get out

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of bed to get water he prevented her; at five o'clock on Tuesday he left my room; he did not come on Tuesday, and she was no better, vomiting all the time; he came on Wednesday, about half-past six, P. M.; on Wednesday she felt better, and was up by seven, A. M.; when he came she was in bed, and I was talking to her; he asked her how she felt; she said she felt no better; he sat down by the bedside, and she took hold of his hand and put it on her heart and said the pain was there; she felt as if she was all on fire; she told him to look at her gums; they were all raw; when I last saw that her gums were raw, she asked her husband to look at them; he said they were not so bad as she said they were; he asked her if she had eaten anything; she said yes, some tea witness had made for her, having some toasted bread in it; I made the tea, used the brown sugar taken at the inquest, and tried to get her to take some more of it before he came in, but she could not; placed the bowl on the stove; no fire in it; when he came in it stood in the same place, with toast in it; I drank some of the tea that was in the bowl; he took the bowl and tasted the tea; said it was not sweet enough; she said she did not want any more sugar in it as it made her thirsty; he then asked her if she wanted anything; she said no; I told him a little port wine would strengthen her; he said yes, go and get some; I did so, and returned in about ten minutes, when he was sitting on the bedside with my baby on his lap; I gave her a little of the wine in a tumbler; she did not wish it, but he insisted, and she drank about a tea-spoonful of it; when I came in the toast was broken, and stirred in with the tea, and the spoon was in the middle of the bowl; when I left the toast was whole, and the bowl was nearly full; he took the bowl after I had put the wine away, and asked if there was any sugar; Mrs. Williams replied there was plenty; I got the sugar jar and held it up; he shook the spoon before he put it into the sugar; he took one spoonful and mixed it with the tea and toast; he

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then said he would feed her with that, as she had often fed him; she then laid on her back on the bed; he gave her one spoonful and told her to sit up; she sat up, and he gave her a few spoonfuls more; she said, Andrew, dear, I cannot take any more; he said she must take it, as it would strengthen her a good deal, and if she would he would give her a splendid dress and a new hat; she then put her hand round his neck and kissed him; she had drank nearly all the tea, and then said to me, Mrs. Campbell, you ought to examine your sugar; I asked her what was the matter with it, and she said it was all sand; I then looked at her, and it was like the cracking of salt under her teeth, and he was scraping the bowl, and giving her what was left of it; she took it all; he gave her all; he then set the bowl on my trunk and came back to the bedside, and said, Mrs. Campbell, you did not take any of the wine, and he got up and poured some in the tumbler; I told him I did not care for the wine; I drank it; he then put a spoonful in the tumbler and gave it to his wife; he was then going to leave, and she said on Friday she would be able to go after money; he said she would not; he said he would call on Friday to see how she was, and if she was not able to go he would bring the money himself; as he was leaving he said he would get the money, and leave it with her; he then kissed his wife, and shook hands with her; I then lit him down stairs; when I returned she was vomiting; she told me her whole body was all in a flame, and that her two ears were burning; she said she should not live till five o'clock in the morning; she died about three o'clock, Thursday morning; I was with her when she died, with the exception of a few minutes; from the time I lighted him down stairs, her condition was most awful, vomiting and drinking water; she was conscious to the time of her death; I went to Mrs. Lambert to come in about an hour before her death, for I was frightened at being left there.

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Cross-examined. The bowl out of which she had been fed was on the trunk when she died ; I cannot say how long it remained there ; there were half a dozen people in the room from breakfast time until she died ; I took hold of the bowl to look at it and set it down again ; I handed the police the bowl about ten minutes after she died ; I prepared the tea for her about half-past five o'clock on Wednesday afternoon ; I got the water to make the tea from Mr. Hart's store ; I got it in a wooden pail ; I boiled it in a tin vessel which belonged to me ; I do not know how many bowls full it would hold ; I got the tea from Mr. Cashen's, at the opposite corner ; deceased bought the tea on the Saturday previous ; we used to use each other's provisions occasionally ; when she purchased the tea I had none in my room ; I did not purchase any between Saturday and Wednesday ; the tea was kept in a glass bottle which I got in Hart's store ; I placed it in my trunk ; it was not locked then ; when the tea was ready I went to the trunk and got a bowl , the bowl was near her bed during the day ; I poured out one bowl of the tea for her and two for myself, and sweetened them of the same sugar ; she had a slice of toast which I prepared, and she broke it in two and put half in the tea ; she took two or three swallows of tea before he came in ; she retained the tea on her stomach ; I proposed to go out and get some port wine, as it would do her good, and he asked me to go for it ; I got the wine in a small black bottle ; I got the tumbler from which she drank the wine from outside of my trunk ; the tea might have been on the stove an hour before I went for the wine ; I had not touched it during that time ; the spoon was in the bowl, resting against the side ; when I came back, I noticed that the bread was mixed up in the bowl ; I made such a statement before the coroner ; when I came in, the spoon was standing in the centre of the bowl, upright ; the prisoner came four times to see his wife during her illness ; once on Sunday, twice on Monday, and once on Wednesday ; he came the first time on Monday, before Dr.

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Bishop came, and the next time after; the first time he remained but a short time; he came the second time at about eight o'clock in the evening; when he came the first time he said he had left the money at the hall.

David Uhl, M. D., testified: I am a physician; I made a *post mortem* examination of the body of Rose Williams; Coroner Wilhelm's deputy, Dr. Richardson, assisted me; I did so on fifth of May, at 58 Duane-street, between eleven and twelve o'clock; I found the woman lying in her bed; her limbs were rigid and contracted; she had purple spots around the mouth and on other parts of her face; there was a slight bruise on the left leg, below the knee, and no other violence on the body; on opening the chest, from the neck down, I found the lungs congested; the heart was healthy, but filled with clotted blood; I then tied both ends of the stomach and laid it on a clean rag on the floor; I then examined the intestines, and laid a portion of them by the stomach; I then took out the liver; I took the contents of the stomach and emptied them into two pint bottles, and sealed them up; the fluid I emptied into them contained a large quantity of white powder which was in large cakes; the mucous membrane was inflamed; I put the stomach and liver in a cloth, and sewed up the body; I then went to the coroner and labeled the bottles; the stomach also contained a large quantity of this white powder. I then took the stomach, bottles and liver to Dr. McCready; he was not in, and I waited until he came in, and I delivered them over to him personally, in the same state in which they were when I took them from the body; the coroner gave me the bowl, which I did not take up to McCready's at that time, because I could not carry it; I locked it up, and took it to him in the evening; I received the bowl at the coroner's office.

Question. In what condition was it?

This question was objected to by the prisoner's counsel, and the objection overruled and an exception taken. The

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same objection was made to proving the contents of the bowl, which was also overruled and an exception taken.

Answer. There was a very white substance on the inside of the bowl, which I carefully scraped, and tied the bowl up in a piece of paper.

Question. When did you receive that bowl?

Answer. Before I made the *post mortem*.

Question. Were you present at the examination of the contents of the stomach?

Answer. On the first evening; it was made on the fifth of May; the principal test was Marsh's, which is the best test that can be applied; the test was applied to the white powder in the stomach, and we found arsenic; there was not less than a drachm; on Tuesday evening we made an analysis of the contents of the bowl, and found arsenic.

Question. About what quantity?

Answer. I cannot say; in my opinion undoubtedly the cause of her death was from arsenic; I did not examine the sugar.

Cross-examined. I have made five or six *post mortem* examinations where death was caused by arsenic; I made the *post mortem* in this case about forty-eight hours after death; the coroner handed me the bowl in his office twenty minutes before I examined the body; he did not have it in his hands when I came in; there were three persons in the office; the bowl stood on a table by the desk; I wrapped it up in a piece of paper which was in the office; did not examine it particularly; had no place to lock it up, so hid it under a lot of papers in the office; the room was not locked; I returned in three-quarters of an hour and found the bowl safe and the papers not disturbed; went up to Dr. McCready's three hours afterwards; saw the bowl was safe in the same position as I had placed it; I placed the paper over the bowl in a particular position, and then took it to my office and locked it up; there is one person in my office; he had no access to it; at nine o'clock that evening took it to Dr.

McCready's; I examined the rags on which the contents of the stomach were placed, and found them clean; the appearances that would result from antimony and arsenic, when analyzed, would be nearly the same; I am not an expert.

Benjamin W. McCready testified: I am a physician; have been a graduate twenty years; have lectured on toxicology; Dr. Uhl requested me to analyze a human stomach, with two bottles with contents labeled and sealed; on fifth May he brought me the bowl and a spoon; from examination of the contents of the body, no doubt arsenic was in the stomach; from its contents four drachms of arsenic were produced; fifteen or twenty grains would produce death; on taking arsenic, the patient feels as though the abdomen was on fire, and vomiting is incessant; the patient complains of its grittiness when swallowed; I would attribute but little importance to blue spots on the body after death; I made a separate analysis of the contents of the bowl and spoon together.

The prisoner's counsel objected to proving the analysis of the contents of the bowl, but the objection was overruled and an exception taken.

The bowl and the spoon were nearly clean and there was no dry powder upon them, but a dirty substance was scraped from them, and, the proper analysis having been made, arsenic was discovered; about two or three grains of matter were taken from the bowl and the spoon, and nearly all of that was arsenic.

The Coroner testified: That he held an inquest on deceased on Friday, fifth May, between ten and eleven o'clock; that he received the bowl in question from Lieutenant Bingham, of the sixth ward station-house, about twelve o'clock; that when he received it it was not clean, but there was a whitish stuff adhering to the sides and at the bottom; that he took the bowl with him to the office and gave it to Dr. Uhl, the physician, to make the analysis, and that it did not go out

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of his (the coroner's) hands till he delivered it to Dr. Uhl, and that, when given to the doctor, it was in the same state as when he received it.

James Lanagan identified the bowl and testified that he received it from Mrs. Campbell, at the house where deceased died, and took it to the station-house and delivered it to Lieut. Bingham; that there was a substance around the side and bottom of the bowl.

Alonzo Bingham testified: That he received the bowl from Lanagan; that he noticed some substance in it that looked like gruel; that he set it on a book-case, about eight feet high, in the front office; that he took it from the same place two days afterwards, when he delivered it to the coroner, and that it was then apparently in the same state as when he placed it there.

On *cross-examination*, he said he was not in the office the whole time the bowl was there, and that forty policemen might have been in the room during the forty-eight hours it was there.

A jar of brown sugar was produced on the trial, which was identified as belonging to Mrs. Campbell, and being the one referred to by her, and which it was proved had been taken from her and delivered to the coroner at the inquest, and had been kept by the coroner till produced on the trial.

George Kellogg, Jr., testified: I am the agent for the governors of the alms-house; I know the deceased and the prisoner.

Question. Do you know of any complaint having been made by the deceased against her husband?

Counsel for the prisoner objected, as the recognizance was not produced.

Mr. Kellogg produced the recognizance, dated June 7th, 1853.

Counsel for prisoner objected to its reading.

Examination resumed. Payments indorsed on the back of the recognizance have been paid by the prisoner to me up

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to the second of May; I am sure it was on the second of May (Tuesday), at the time of making that payment to me, he stated he thought his wife would not be able to come for the money, and that he would call and take it to her; I asked him "why?" he said she was sick; I told him we could pay it to no other person but her; he then left; the last payment was ten dollars.

Cross-examined. We generally require a month's payment in advance; we paid her by weekly installments of two dollars a week; we generally paid on Friday; sometimes she would come for the money and I refused to give it to her.

The district attorney then proposed to put the recognizance in evidence.

The counsel for the prisoner objected to the recognizance being put in evidence, or read to the jury, on the ground that the magistrate had not been produced to prove that it was subscribed and taken before him, and that there was not even proof of the signature purporting to be that of the magistrate.

The court overruled the objection of the counsel for the prisoner, received the recognizance in evidence and permitted it to be read to the jury. To which said decision of the court the counsel for the prisoner excepted. The recognizance was in words and figures following:

City and County of New-York, ss:

Be it remembered, that on the seventh day of June, one thousand eight hundred and fifty-three, Andrew Williams, of number twenty-one West-street, in the city of New-York, and William Broock, of number twenty-one West-street, in the said city, personally came before me, Abraham Bogert, one of the police justices for preserving the peace of the city of New-York, and acknowledged themselves to owe to the people of the State of New-York, that is to say, the said Andrew Williams, the sum of three

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hundred dollars, and the said William Broock the sum of three hundred dollars, separately, of good and lawful money of the State of New-York, to be levied and made of their several and respective goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition hereinafter mentioned.

Whereas, The said Andrew Williams has been duly convicted of being a disorderly person, that is to say, a person who has abandoned his wife, Rose Williams.

Now, therefore, the condition of the above recognizance is such, that if the above named Andrew Williams shall be of good behavior towards the people of the State of New-York, for the space of one year next ensuing the date hereof, then the above recognizance be void, otherwise to remain in full force and virtue.

Signed,

ANDREW WILLIAMS.

his
WILLIAM X BROOCK.
mark.

Taken and acknowledged before me, }
the day and year first above written. }

A. BOGERT, Jr., *Police Justice*.

The general character of the prisoner was proved to have been good. After the evidence was closed and the jury had been addressed by the respective counsel, the counsel for the prisoner asked the court to charge the jury that if the bowl was exposed on a table or in a chest, or room, or elsewhere, where many persons had access, between the time it was taken from the room of deceased and the chemical analysis by Prof. McCready, the evidence, as to the analysis of the contents of the bowl, should be rejected.

The court refused so to charge and the counsel for the prisoner excepted.

The court charged, among other things, that the jury might infer that the deceased was with her husband on the

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Saturday night preceding her death, although the evidence on that point was very slight; to which the counsel for the prisoner excepted.

The court further charged the jury that they might also, if the evidence in their judgment would warrant it, infer that the toasted bread in the bowl was the same which had been mutually used by the deceased and the witness Mrs. Campbell. To this the counsel for the prisoner also excepted.

The jury found the prisoner guilty of murder, and judgment of death was pronounced against him.

A bill of exceptions having been made, the case was carried to the Supreme Court upon a certificate in the following form :

Upon hearing the counsel for the said Andrew Williams, and also Mr. Blunt, the district attorney, on behalf of the people, after due notice to him, and upon examining the above bill of exceptions settled and signed by Justice Roosevelt, who tried the said cause, and at whose desire the matter was heard before me: I, William Mitchell, justice of the Supreme Court of this state, do hereby certify on said bill that, in my opinion, there is so much doubt on the questions of law raised by said exceptions as to render it expedient to take the judgment of the Supreme Court thereon, and that a writ of error should be allowed to the prisoner; and I do accordingly allow such writ of error to issue, and do expressly direct that the same is to operate, as a stay of proceedings on the judgment upon which such writ shall be brought, until the decision of the Supreme Court shall be had upon such exceptions.

In the Supreme Court the judgment of the Oyer and Terminer was reversed, and the following opinions given :

CLERKE, J.—The declaration of the deceased could only have been received as a part of the *res gesta*, or as a dying declaration.

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When an inquiry into the condition of a person's health is material, any account given by such person relative to health is evidence of complaints and symptoms; but it is not evidence to charge any other person as to the cause of those sufferings, nor is such an account any evidence of the truth of what has been declared. Anything which Mrs. Williams said to the witness Campbell, relative to the pain she was suffering and the particular nature of her complaint, was admissible; but that portion of her conversation which related to her alleged visit to her husband, and to what occurred during that visit, could only have been received on the ground that she made those statements under the apprehension of death. To warrant this, she must have been conscious of danger, and must have abandoned all hope of recovery, indicating a condition which the law supposes calculated to impress on the mind an obligation equal to that imposed by an oath administered in a court of justice. It is, indeed, the province of the judge, and not of the jury, to determine whether the circumstances under which the declarations were made are sufficient. But there must be some proof that the deceased was conscious of approaching and inevitable death. It is not necessary that this should be uttered in express terms; but it may be inferred from the tenor of his conversation, the nature of his sufferings, and his whole demeanor.

In the present case nothing sufficiently definite was presented to the judge to direct his attention to the subject; the witness was not asked a single question on this point; indeed it is probable, at the time when she made the declarations in question, she had no thought that her life was in danger.

I am of opinion, therefore, that the court erred in admitting those declarations.

A new trial should be granted.

MITCHELL, J.—I concur; and am also of opinion that the recognizance was not sufficiently proved.

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The cause was then brought into the Court of Appeals by a writ of error issued on behalf of the prosecution.

A. Oakley Hall (District Attorney), for the people.

I. The Court of Oyer and Terminer were correct in admitting the declarations of the deceased, excepted to, and the court correctly charged the jury upon them. First. There were declarations made by her when leaving to visit her husband. Second. There were those made in presence of her husband. Third. There were some made *in extremis*. Fourth. There were others regarding feelings of and symptoms of bodily condition. The declarations embraced by third and fourth subdivisions are so clearly admissible, it will not become necessary to discuss them. There were two classes of facts, embraced by the prosecution, unto which these declarations related: First. Showing that deceased died from poison; Second. Showing that prisoner poisoned her. It is respectfully insisted that the general term mistook the extent and effect of the testimony thus excepted to. The evidence concerning the "going" of the deceased was pertinent, to show her then healthy state, her frame of mind, her disposition toward her husband, and particularly herein rebutting the idea of suicide by the deceased. The declaration, answering question excepted to, viz.: "State where deceased said she was going on the Saturday evening previous to her death," accompanied an act. It was (1 *Greenl. Ev.*, §§ 109, 123) "a verbal act, indicating present purpose and intention." It was a declaration, part of, and accompanied by, and explanatory of an act. (1 *Phil. on Ev.*, 204.) There was a declaration, "She said she got sick on board the vessel, on which her husband was; she said she had not been drinking," &c. There was no exception taken to this upon the trial, but the court, at general term, criticize it in the opinion. No exception was taken, for the very obvious reason that, when the prisoner came to see

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the deceased, after her return, from "somewhere," the conversation and remark between the two showed that she had been with him, in accordance with her intention expressed at starting. And the declaration as to her being taken sick from drinking, &c., &c., was also remarked upon by prisoner. Now, it is insisted that, even if the "verbal act," or her declaration of whereabouts, were inadmissible, the fact which they went to prove (presence with husband on the vessel and sickness there) was evidenced by the husband's admissions and remarks on the subject. The defect, if defect, was cured. Then the judge charged "that the jury might infer that the deceased was with her husband on the Saturday night preceding her death, *although the evidence on that point is very slight.*" The expressions of symptoms were competent testimony (1 *Greenl. Ev.*, § 102; 1 *Phil. Ev.*, 190; *Aveson v. Kinniard*, 6 *East*, 189), relevant to show the first fact averred in the indictment, "death by poisoning." It was said below that the symptoms could not charge the prisoner. The suggestion is made that the general term mistook the effect and extent of this testimony respecting symptoms, because the evidence of the poisoning whereof she died was upon an occurrence unaffected by the declarations as to departure and symptoms; indeed, upon an occurrence subsequent to the time of their being made. Saturday, in the evening, she leaves to visit her husband. Sunday, in the morning, she returns; prisoner comes to see her. Monday, in the afternoon, prisoner calls again and leaves; returns in the evening and stays all night until Tuesday, to five in the morning, and goes away. Wednesday, in the afternoon, he came again, and then sedulously fed her from the bowl whose contents showed presence of arsenic, &c. Thursday, near daybreak, she died. Had the prisoner been, how could he be, affected by the alleged declarations? The evidence came in as part of the *res gesta* in a chronological chain of testimony from the time she

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ceased to be in good health until she died. But the poisoning itself is upon evidence entirely unexceptionable.

II. The Court of Oyer and Terminer correctly admitted the testimony concerning the bowl and its contents. 1. It was competent for the jury. The jurors could give to it what regard they chose. The bowl was traced for identity in the same manner in which any fact of the same nature is traced by lines of evidence. 2. The bowl was traced from the prisoner most directly. The prisoner placed it upon a trunk, from whence Mrs. Campbell, the witness, took it; she gave it to officer Lanagan; officer Lanagan to Lieut. Bingham; Lieut. Bingham to the coroner; coroner to Dr. Uhl, and to Dr. McCready, and the two make an analysis. There was arsenic found in the bowl. The jury found that this bowl was the same bowl which the prisoner used when feeding his wife. Their finding is conclusive.

III. The court properly allowed the introduction of the recognizance. It was pertinent to show a motive for the crime. 1. It was a recognizance, and not a bond. (*Laws of 1833*, 11, § 7; 2 *R. S.*, 920, § 31, 4th ed.; *id.*, 53, 54; *The People v. Kane*, 4 *Denio*, 540, 543.) 2. It was a record, and proved itself. (*Id.*) 3. It was authorized by statute, and taken and acknowledged before an officer thereunto authorized. (*Id.*) 4. It came from the custody of those entitled to sue upon it by statute. 5. But the court will see, from the manner of the production of the recognizance, that it came not only as if proving itself, but in connection with the testimony of George Kellogg, Jr., Alms-house superintendent, exactly as if it were a private admission of the prisoner, and upon which he had acted. 6. The recitals proved nothing more than the evidence of Mr. Kellogg, showed to be the fact. 7. This being the case, how has the prisoner been, or rather how could he have been, prejudiced?

Henry L. Clinton, for the prisoner.

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I. The court erred in admitting in evidence the declarations of the deceased, as stated by Mary Campbell. This answer was elicited by the district attorney asking the witness to state "where the deceased said she was going on the Saturday evening previous to her death," and taken under defendant's objection and exception. The court also erred in charging "that the jury might infer that the deceased was with her husband on the Saturday night preceding her death." This inference rested solely on these declarations of the deceased, made in the absence of the prisoner. The testimony was mere hearsay, and was clearly inadmissible. In the case of *Kirby v. The State* (9 Yerger, 383), it was held that evidence that the deceased, while on his way to the place where he was found murdered, and the day before he was supposed to be killed, had stated that he was going to that place, and that the defendant was going with him, was incompetent. In *Zeller v. The State* (2 Halst., 220), it was held that conversation of the deceased with a third person, or acts of the deceased which never came to the knowledge of the prisoner, cannot be received in evidence. The principle of these cases is too clear and well established to require a citation of further authorities. There was no pretence on the trial that these statements of the deceased were dying declarations, and if they had been offered as such they would have been clearly inadmissible; because they were not made *in articulo mortis*, or under the consciousness of impending dissolution. On the contrary, the deceased, during the time these declarations were made, and afterwards until a few hours before her death, indulged the hope of recovery. When her husband left her on Wednesday evening, she stated that "on Friday she would be able to go after her money." (*Rosc. Cr. Ev.*, 27, 38; 1 *Phil. Ev.*, 285, 9th ed.; 2 *Russ. on Cr.*, 752-4, 6th Am. ed.) The declarations formed no part of the *res gesta*. The most important declaration of the deceased was: "She did not return until five o'clock the next morning; when she came she said she

got sick on board the vessel on which her husband was." This, if true, was a narrative of a past occurrence. In 1 *Greenleaf's Evidence* (§ 110), the author, in speaking of what constitutes *res gesta*, says: "It is to be observed that where declarations offered in evidence are merely *narrative of a past occurrence*, they cannot be received as proof of the existence of such an occurrence. They must be *concomitant* with the principal act, and so connected with it as to be regarded as the mere result and consequence of the co-existing motives, in order to form a proper criterion for directing the judgment which is to be formed upon the whole conduct."

The declarations of deceased as to her symptoms were not evidence to charge the deceased, nor were her declarations any evidence of the truth of what she declared. (*See opinion of Justice Clarke.*) The point as to the admissibility and effect of these declarations, and particularly as to the declaration of deceased that "she got sick on board the vessel on which her husband was," is distinctly raised: First. By the decision of the court allowing the declarations to be given in evidence. Exception was taken to the decision of the court below, in allowing the particular answer of the witness embracing these declarations to be regarded as evidence; Second. The point is distinctly raised in the exception to the charge of the court, "that the jury might infer that the deceased was with her husband on the Saturday night preceding her death," there being no evidence of the fact other than these declarations; Third. Now the statute provides that, on "every conviction for a capital offence," &c., the court may consider any question of law arising in the cause, whether exception was taken or not. The prisoner suffered material prejudice in the introduction of these declarations; they formed the material links in the chain of evidence which resulted in his conviction.

II. The testimony of Dr. Uhl as to the condition and contents of the bowl, taken under exceptions, and the analysis of the contents of the bowl by Prof. McCready,

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taken under exceptions, were improperly admitted because they were not sufficiently identified; and the court erred in refusing to charge as requested on that subject. Even in the case of larceny or counterfeiting, the identity of the stolen property or counterfeiting must be proved. (1 *Russ. on Cr.*, 125; *Rosc. Cr. Ev.*, 632.) A double reason exists for proving the identity of the poison in this case.

III. The court erred in receiving in evidence the recognizance without due proof of its execution. This instrument was introduced, not as a record, but as a private writing. There was no legal proof of the acknowledgment of this paper, or of its having been filed as a recognizance or bond. The certificate of proof or acknowledgment being in these words, "Taken and acknowledged before me the day and year first above written," and purporting to be signed by "A. Bogart, Jr., Police Justice," does not entitle the instrument to be read in evidence without further proof thereof, because it does not certify that the individual was known to the officer, or identified by satisfactory proof, and because the officer was not authorized to take acknowledgments of conveyances of real estate, and his signature was not proven. (1 *R. S.*, 758, §§ 9, 15, 16; 2 *id.*, 42, 43, 3d ed.) Police justices are not named among the officers referred to (1 *R. S.*, 758, § 16) as having authority to take proof or acknowledgment of conveyances of real estate. The courts of this state are strict and uniform in requiring a substantial compliance with these statutory provisions, and in no case have they dispensed with the certificate of an officer having jurisdiction or authority to take the acknowledgment, and in requiring him to state that he knew or had satisfactory evidence that the person making such acknowledgment was the individual described in and who executed such conveyance. (*Jackson v. Humphrey*, 1 *John.*, 498; *Jackson v. Gumaer*, 2 *Cow.*, 552; *Jackson v. Vickory*, 1 *Wend.*, 412; *Duval v. Covenhoven*, 4 *id.*, 563; *Broadstreet v. Clark*, 12 *id.*, 673; *Dibble v. Rogers*, 13 *id.*, 541; *Thurman v. Cameron*, 24 *id.*, 87; *Merriam v. Horsea*,

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2 Barb. Ch. R., 232; Crowder v. Hopkins, 10 Paige Ch. R., 183; Jackson v. Shepherd, 2 John., 79.) The court also erred in receiving the recognizance in evidence, because it tended to show the prisoner guilty of the offence of being "a disorderly person," and his character could not be attacked in that way. (2 Russ. on Cr., 784; Russ. Cr. Ev., 97; Arch., Cr. Pr., 111.)

DENIO, J.—The evidence to show that the deceased came to her death from the effects of arsenic taken into her stomach was quite satisfactory; and there was strong reason to believe that she swallowed a portion of this poison during her absence from the house in Duane-street, between Saturday evening and Sunday morning. If, during that absence, she was in the company of the prisoner, the latter had an opportunity to administer it to her in food or drink. His subsequent conduct was such as to attach suspicion to him, and to lead to the belief, more or less strong, that if she was poisoned during that absence he was guilty of the act, provided it was made to appear that he had an opportunity of committing it. Hence it was an important fact for the prosecution to establish that these persons met together while the deceased was abroad on Saturday night. It was competent to show this by the evidence of persons who saw them in each other's company; or it might have been proved by the prisoner's confessions. There was some evidence of the latter character; for the prisoner was proved to have asserted that the deceased did not indulge in drinking while she was from home, at the time referred to, a fact which he could scarcely have known except by having been with her. Although the inference from this declaration was pretty strong, and might have enabled the jury to find the fact, it was not of such a conclusive character as to preclude other testimony upon the point, and the prosecution sought to furnish such other evidence by proving the declaration of the deceased, of her intention to go to her husband, when

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she set out from home on Saturday evening. The question to be determined is whether that declaration was competent to be given in evidence. The evidence of the witness Mary Campbell, of what the deceased said, after her return, as to her having been with her husband, was not objected to. It was, however, clearly incompetent. It was not admissible as a dying declaration; for, although the deceased returned very ill, there is no evidence, nor any reason for believing, that she then apprehended a fatal result. The circumstance that it was received without objection, and that it tended even more strongly to show the existence of the material fact sought to be proved than the declaration which was objected against, does not relieve us from the duty of examining the validity of that objection. The jury may have disregarded the incompetent declarations made by the deceased after her return and have relied upon the proof of her declared design on setting out, which the court had held to be competent; or the ruling of the court, admitting her declaration last mentioned to be received, may have led them to the belief that all her declarations which were proved were competent. We must therefore determine whether the decision of the court below, admitting proof of the statement that she was going to see her husband, when she left the house on Saturday night, was correct or not. It was attempted, on the argument, to be sustained as a declaration characterizing an act, and constituting, in legal understanding, part of the act itself. This is a recognized exception to the rule excluding hearsay as evidence; for when it is necessary, in the course of a cause, to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it is admissible in evidence for the purpose of showing its true character. (1 *Phil. Ev.*, 231, *Gould's ed.*) But to render the declaration competent, the act with which it is connected should be pertinent to the issue; for where the act is in its own nature irrelevant, and when the declara-

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tion is *per se* incompetent, the union of the two will not render the declaration admissible. (*Wright v. Doe*, 7 *Adolph. & Ellis*, 289.) The material fact here was, that the prisoner and the deceased were together on Saturday night. Even this was not a principal fact, but only a circumstance to show that the prisoner had an opportunity to commit the offence. That the deceased left the house in Duane-street at a particular time was of no materiality, unless it was also shown that during her absence she met the defendant. The act itself was indifferent to the issue, whatever the intention was with which it was done. If the deceased met the prisoner, and thus afforded an opportunity of committing the offence, it is immaterial whether she intended or expected thus to meet him or not; and so, of course, if she failed to meet him he could not properly be prejudiced by the circumstance that she went out with a design to go to him. The evidence was not offered to qualify an act connected with the issue, but to induce the jury to infer another act not otherwise shown to exist: that of his being in company with the deceased. Suppose a declaration had been made by the deceased, on the previous day, of an intention to go to her husband on that particular evening: such declaration being unaccompanied by any act would rest wholly in assertion, and would be clearly without the rule referred to; yet the proof would be essentially of the same character, and subject to no greater objections than the evidence we are considering. I am of opinion, therefore, that the case was not within the rule admitting a declaration accompanying an act, on the ground of its being a part of the *res gestæ*; and I know of no other ground upon which the case can be taken out of the general rule which excludes, under the name of hearsay, declarations not made under the responsibility of an oath.

Enough has been said to show that the judgment of the Supreme Court ought to be affirmed.

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Upon a second trial the question will again arise as to the admissibility of the evidence showing that arsenic was found in the bowl which was examined by the chemist. We have looked carefully into the evidence of identity, and are of opinion that it was sufficient to authorize the court to submit the question to the jury.

The judgment of the Supreme Court must be affirmed.

HAND, J.—The proof of what the deceased said when she was leaving the house of Mrs. Campbell was not admissible. It was no part of the *res gesta*, for it was no part of the principal transaction, nor contemporaneous, or even incidental to it. It was spoken at a time previous to any part of the transaction constituting the supposed offence, and in the absence of the prisoner, and when the deceased had no apprehension of danger, and much less *in extremis*.

I see no objection to the testimony in relation to the bowl or its contents. Whether the evidence was sufficient to identify the former, or show what constituted the latter, were questions for the jury, and the proof given on these points was competent for their consideration. No one portion of it, or that given by one witness, might have been sufficient; but all of it together might be, and the prosecution was not obliged to give conclusive proof at every step.

It was also competent for the prosecution to prove that the prisoner had made payments upon the paper produced in court. That was a mere circumstance, and the production of the paper and such proof did not contravene any rule of evidence in relation to the proof of written instruments.

But the recognizance itself was given in evidence without any proof of its execution, except what appeared upon the face of the instrument, and the testimony of an agent of the governors of the alms-house that the prisoner had made payments upon it. I am inclined to the opinion this was not sufficient. A recognizance is said to be a matter of record.

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(1 *Chit. Cr. L.*, 90; *The People v. Kane*, 4 *Denio*, 530.) But this was taken before a police justice in the city of New-York, under the statute in relation to disorderly persons, and is but an acknowledgment, upon which, perhaps, a record might be made up. It does not appear to have been filed with any officer, and there was no proof of its execution nor of the identity of the persons recognized, except by the payments. Using one's own affidavit in a cause may sometimes be sufficient evidence of identity as against the party making it; but, as a general rule, even an affidavit cannot be given in evidence, at least before it is filed with the proper officer, without some proof. (1 *Chit. Cr. L.*, 576; 1 *Phil. Ev.*, 379; *Bellinger v. The People*, 8 *Wend.*, 598; *Rex v. Smith*, 1 *Str.*, 126; 2 *Cow. & Hill*, 1100.) This recognition must have been introduced for the purpose of showing an inducement to commit the crime, or that difficulties had existed between the husband and wife. It purported to have been signed by the prisoner and another, and to have been taken before an officer; but it would be dangerous, especially in a capital case, to admit such a document without any proof whatever.

However, it is not necessary to pursue this point further, as the admission of evidence of what the deceased said before the commission of the supposed offence clearly entitled the prisoner to a new trial, and the Supreme Court was therefore right in reversing the judgment on that point.

The judgment should be affirmed.

The other judges concurring,

The judgment of the Supreme Court, reversing that of the Oyer and Terminer and ordering a new trial, was affirmed.

CHENANGO OYER AND TERMINER, February, 1856. Before *Shankland*, Justice of the Supreme Court, and the Justices of the Sessions.

THE PEOPLE v. BENJAMIN HARRIOT.

It is not a sufficient reason for quashing an indictment that the list of persons from which the grand jury, which found it, was drawn, contained, as originally prepared by the board of supervisors, the names of only two hundred and ninety-nine persons, instead of three hundred as required by statute.

THE prisoner was indicted for perjury, and, on being arraigned, a motion was made, on his behalf, to quash the indictment, upon the ground that the grand jury that found the indictment was drawn from a list of only two hundred and ninety-nine grand jurors, the board of supervisors of the county having prepared a list containing the names of only two hundred and ninety-nine persons, instead of three hundred, to serve as grand jurors, pursuant to the provisions of section one of article one, title four, chapter two, part four of the Revised Statutes, and that only the names of these two hundred and ninety-nine persons were put in the grand jury box.

The district attorney contended that this alleged defect, if true, did not present good cause for quashing the indictment.

Isaac S. Newton (District Attorney), for the people.

Benjamin F. Rexford and *H. Packer*, for the defendant.

SHANKLAND, P. J.—The statute commands the supervisors to select the names of three hundred men, possessed of certain qualifications, to serve as grand jurors for the ensuing year. In this case, it seems that but two hundred and ninety-nine were thus selected, and the present indictment was found by a grand jury drawn from the two hundred and ninety-nine names. We are of opinion that the

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omission lies too far back to vitiate the indictment. The chances of such omission harming the prisoner are too remote to possess practical value. It depends on the following contingencies: First. That the person whose name is omitted would be alive at the time of the drawing of the grand jury and still in the county; Second. That his name would be drawn on this particular jury; that he would be summoned by the officer and should attend the court; Third. That he should be opposed to the finding of the indictment, and that his opposition would reduce the number of jurors in favor of finding a true bill to less than twelve. These contingencies reduce the chances of harm to a practical nonentity, and justly subject the alleged error to the operation of the maxim, "*The law careth not for small things.*"

Such, also, would seem to have been the views of the legislature, for they have made no provision for challenges for this cause or any other cause so far back in the process of procuring a grand jury; but they seem to have confined the defendant's challenges to the particular grand jury by whom he may be indicted, and his challenges then are specifically pointed out and all others are peremptorily prohibited.

It would seem that the omission which is complained of can have no more force than if three hundred had been duly selected by the supervisors, and it had happened that one thus selected had died, or removed, or was too old to serve; and yet, in such a case, I doubt whether any lawyer would seriously raise the objection. The three hundred selected by the board are always subject to be reduced in numbers by death, removal and other causes, and yet no provision is made for keeping up that number, unless the number be reduced to less than fifty. In short, it is not until the names are drawn from the box for the formation of the grand inquest that the defendant becomes interested

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in the procedure, and at that point commences the right to challenge.

We are therefore of opinion that the objection against this indictment ought not to prevail.

Motion denied.

SUPREME COURT. Dutchess General Term, April, 1856. *Brown, S. B. Strong and Emott*, Justices.

HANNIBAL FRENCH and CHARLES J. CONKLIN, plaintiffs in error, v. THE PEOPLE, defendants in error.

In an indictment against two persons, for selling liquor in violation of the excise laws, it is no defence to one that he did the acts complained of as a clerk of the other defendant, and by his direction, there being no allegation that the illegal acts were done by compulsion.

The provisions of the Revised Statutes, relative to the primary examination of persons accused of crimes, do not limit the right of the people, through their officers, to institute accusations before the grand jury; and it is no defence to an indictment that, previous to the complaint before the grand jury, there had been no preliminary proceedings before a magistrate.

Form of an indictment for a violation of the fifteenth and sixteenth sections of the statute entitled "Of excise, and the regulation of taverns and groceries" (1 R. S., 854), of special pleas to the same, and of demurrer and joinder.

THE defendants were jointly indicted, at the October term of the Suffolk circuit, 1854, for a violation of the fifteenth and sixteenth sections of the statute entitled "Of excise, and the regulation of tavern and groceries." The indictment was remitted for trial to the Court of Sessions of Suffolk county.

The indictment was as follows:

Suffolk County, ss:

The jurors of the people of the State of New-York, in and for the body of the county of Suffolk, upon their oath,

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present : That Hannibal French, late of the town of Southampton, in the county of Suffolk, merchant, and Charles J. Conklin, late of the same place, merchant, on the fifteenth day of February, one thousand eight hundred and fifty-four, with force and arms, at the town and in the county aforesaid, did willfully unlawfully and wrongfully sell, to divers persons, strong and spiritous liquors and wines, in quantities less than five gallons at a time, to wit, one gill of rum, one gill of brandy, one gill of whiskey, one gill of gin and one pint of wine, without having a license therefor granted, pursuant to the provisions of the statute entitled "Of excise, and the regulation of taverns and groceries," in contempt of the said people and their law, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present : That the said Hannibal French and Charles J. Conklin, on the fifteenth day of April, one thousand eight hundred and fifty-four, with force and arms, at the town and in the county aforesaid, did willfully, unlawfully and wrongfully sell, to divers persons, other strong and spiritous liquors and wines, in quantities less than five gallons at a time, without having a license therefor granted, pursuant to the provisions of the statute entitled "Of excise, and the regulation of taverns and groceries," in contempt of the said people and their laws, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, That the said Hannibal French and Charles J. Conklin, on the fifteenth day of July, one thousand eight hundred and fifty-four, at the town and in the county aforesaid, did willfully, unlawfully and wrongfully sell, to some person to the jurors aforesaid unknown, other strong and spiritous liquors and wines, in quantities less than five gallons at a time, to wit, one gill of rum, one gill of brandy, one

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gill of whiskey, one gill of gin and one pint of wine, without having a license therefor granted, pursuant to the provisions of the statute entitled "Of excise, and the regulation of taverns and groceries," in contempt of the said people and their laws, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Hannibal French and Charles J. Conklin, on the fifteenth day of August, one thousand eight hundred and fifty-four, at the town and in the county aforesaid, did willfully, unlawfully and wrongfully sell, to divers persons, other strong or spiritous liquors and wines, to be drank in their house there situate, to wit, one gill of rum, one gill of brandy, one gill of whiskey, one gill of gin and one pint of wine, and did then and there suffer such spiritous liquors and wines, sold by them and under their direction and authority, to be drank in their said house, without having obtained a license therefor as a tavern-keeper, in contempt of the said people and their laws, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Hannibal French and Charles J. Conklin, on the fifteenth day of September, one thousand eight hundred and fifty-four, at the town and in the county aforesaid, did willfully, unlawfully and wrongfully sell, to divers persons, other strong and spiritous liquors and wines, to be drank in the house of them, the said Hannibal French and Charles J. Conklin, there situate, and did then and there suffer such spiritous liquors and wines, sold by them and under their direction and authority, to be drank in their house, without having obtained a license therefor as a tavern-keeper, in contempt of the said people and their laws, against the form of the statute in such case made and provided, and

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against the peace of the people of the State of New-York and their dignity.

WM. WICKHAM, Jr.,
District Attorney.

The defendant French interposed the following plea :

SUFFOLK COUNTY SESSIONS.

The People of the State of New-York	}	<i>March, 1855.</i>
v.		
Hannibal French and Charles J.		
Conklin.		

Hannibal French, the above named prisoner, appears in his own proper person and prays judgment of the bill of indictment presented against him, and that the same may be quashed. He alleges and avers that no complaint against him was made to the grand jury of Suffolk county, at the time of the presentation of such indictment or before, by any person, upon oath or without oath, of any offence named in the indictment, or other offence or violation of the law of the State of New-York ; that no complaint was at any time made by any person, before any magistrate of the State of New-York, for the offence named in the indictment against this prisoner, nor was any warrant issued against him, nor was any examination had before any magistrate of the facts constituting the offence named in the bill of indictment ; that no commitment nor return of such arrest and examination was made by any magistrate to any court or to any district attorney of the State of New-York ; that the witnesses, upon whose testimony the said bill of indictment was found, attended by force of a writ of subpcena, issued by the district attorney of Suffolk county, William Wickham, Esq., of his own mere motion, or at the solicitation of some person or persons to this prisoner unknown, several days before the meeting and sitting of the court and the grand jury ; that such subpcena was not issued by the district attorney in

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compliance with any request or direction of the grand jury finding such indictment, nor by the direction of the court, nor in support of any prosecution for any offence against this prisoner; that the witnesses against this prisoner were compelled to attend, by the district attorney, in violation of law and against the statute of the State of New-York; that no notice of such proceeding was given to this prisoner until his arrest; that no challenge or objection was made to the competency of any one of the grand jurors by whom such indictment was found, for the reason that no notice had been given him, by any proceedings before a magistrate, by which he was held to answer a criminal charge; that, by reason of the above facts, this prisoner asks to be relieved from making answer or plea to said bill of indictment, and hereby offers to prove the truth of this plea by his own oath and by other evidence.

Suffolk County, ss:

Hannibal French, being duly sworn, saith: That the above plea is true in substance and matter of fact.

HANNIBAL FRENCH.

Sworn before me, this 6th day }
of March, 1855. }

JAMES B. COOPER, *Clerk*.

The defendant Conklin pleaded as follows:

SUFFOLK COUNTY SESSIONS.

The People of the State of New-York

v.

Hannibal French and Charles J.

Conklin.

The above named Charles J. Conklin appears in his own proper person, and prays judgment of the bill of indictment presented against him, and that the same be quashed; for he alleges and avers: That no complaint against him was

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preferred before the grand jury of Suffolk county at the time of the presentation of such indictment, or before, or by any person, upon oath or without oath, of any offence named in the indictment, or other offence or violation of the law of the State of New-York; that no complaint was at any time made by any person, before any magistrate of the State of New-York, for the offence named in the indictment against him, the said Charles J. Conklin, nor was any warrant or process issued against him, nor was any examination had before any magistrate of the facts constituting the offence named in the bill of indictment; that no commitment nor return of such arrest and examination was made by any magistrate to any court or to any district attorney of the State of New-York; that the witnesses, upon whose testimony the said bill of indictment was found, attended by force of a writ of subpoena issued by the district attorney of Suffolk county, William Wickham, Esq., of his own motion, or at the solicitation of some person or persons to this defendant unknown, several days before the meeting and sitting of the court and the grand jury; that such subpoena was not issued by the district attorney in compliance with any request or direction of the grand jury finding such indictment, nor by the direction of any court, nor in support of any prosecution for any offence against the prisoner; that the witnesses against the prisoner were compelled to attend, by the district attorney, in violation of law and against the statutes of the State of New-York; that no notice of any proceedings was given to this defendant until his arrest; that no opportunity was afforded him to challenge any member of the grand jury, and that no challenge or objection was made to the competency of any one of the grand jury by whom such indictment was presented for want of such notice, and for want of notice by proceeding before a magistrate by which he was held to answer a criminal charge; that, by reason of the above facts, the prisoner asks to be relieved from making answer or plea to said bill of indictment; and the defendant further pleads,

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that before and at the time mentioned in said bill, and at the time of the alleged commission of the offences named in such indictment, he was a clerk in the store of said French, and not a partner, or in any way interested in the profits arising from such sale, or in the business of said French, but acted wholly as his clerk or agent in the delivery of articles sold, and by his directions, and hereby offers to prove the truth of this plea by his own oath and by other evidence.

Suffolk County, ss :

Charles J. Conklin, being duly sworn, saith : That the above plea is true in substance and matter of fact.

C. J. CONKLIN.

Sworn before me, this 11th }
 day of April, 1855. }

JAMES H. PRICE, *Justice of the Peace.*

The district attorney demurred to both of the pleas as follows :

SUFFOLK COUNTY SESSIONS.

The People v. Hannibal French and Charles J. Conklin.
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And William Wickham, Jr., district attorney of the county of Suffolk, who prosecutes for the people of the State of New-York, in this behalf, as to the said pleas of the said Hannibal French and Charles J. Conklin, by them pleaded and set forth, says they are not sufficient in law to have precluded the said people from prosecuting the said judgment against them, the said Hannibal French and Charles J. Conklin, and that the said people are not bound by the law of the land to answer the same ; wherefore, for want of a sufficient plea in this behalf, he, the said district attorney, prays judgment, and that this defendant may be convicted, &c.

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The defendants joined in demurrer as follows:

And the said Hannibal French and Charles J. Conklin say that their said plea, by them above pleaded, and the matter therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said people from prosecuting the said indictment against them, the said Hannibal French and Charles J. Conklin, and they are ready to verify the same; wherefore, inasmuch as the said district attorney has not answered the said plea, nor in any manner denied the same, the said Hannibal French and Charles J. Conklin pray judgment, and that by the court here they may be dismissed and discharged from the premises in the said indictment specified.

The defendants also moved to set aside the indictment. After hearing argument the court denied the motion, and decided the pleas to be bad, and refused judgment of *respondens oster*, and rendered final judgment and pronounced sentence.

Upon a writ of error issued, the proceedings were stayed till the decision of this court.

S. L. Gardiner, for the plaintiffs in error.

I. The writ of subpoena not having been issued by the district attorney in conformity with the requirement of any grand jury, nor in support of any prosecution then pending, was illegally issued, and all subsequent action based thereon by the grand jury was irregular, and the indictment presented was void.

II. The defendants were severally entitled to an examination, in relation to their offence, before a magistrate; to be then and there informed of the charges against them; to the aid of counsel, if required; to be confronted with the complainant and his witnesses; and their examination in his

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presence, on oath, in regard to their offence, to be reduced to writing; to an examination of witnesses in their behalf, and to make their statements explanatory of the charge, and the matters connected therewith, in conformity with the provisions of the statute entitled "Of the arrest and examination of offenders," &c. (2 R. S., 590.)

III. No opportunity of time and place having been given to the defendants to challenge the competency of any person summoned to serve on the grand jury before he was sworn, or at any other time, on the ground that he was prosecutor or complainant on the charge made against the defendants, or that he was a witness subpoenaed or bound in recognizance for the prosecution, and no time or place having been given to establish, by competent testimony or otherwise, the challenge or objection allowed by the statute, the indictment is illegal, void and of no effect, and all proceedings thereon are erroneous and irregular.

IV. No offence was committed by the defendant Conklin, the bare delivery, by a clerk, of property sold by his principal, not making such clerk a principal in any misdemeanor arising out of such illegal sale. The defendant Conklin having no interest in the property sold or consumed, nor control over the premises where it was sold and consumed, cannot be implicated as a principal criminal in the offences described in the fourth and fifth counts of the indictment.

W. Wickham, Jr. (District Attorney), for defendants in error.

I. The pleas are insufficient, and the demurrer was correctly decided. (*The People v. Jewett*, 3 Wend., 314; 6 id., 385; *The People v. Hurlbut*, 4 Denio, 133.)

II. A clerk who sells liquor under the directions of his employer is equally guilty with the latter of a violation of the statute. All who participate in the commission of a

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misdemeanor are principal offenders. (1 *Chit. Cr. L.*, 261; *The People v. Irwin*, 4 *Denio*, 129.)

III. The district attorney is authorized to issue subpoenas in support of any prosecution. (2 *R. S.*, 729, § 23.)

It is believed that the case requires no argument beyond a statement of it. Whatever may be the practice in other counties, in Suffolk county it has been usual for the district attorney, both the present incumbent and his predecessors in office, to issue subpoenas in advance of the meeting of the grand jury, upon a representation made to him, from a source entitled to belief, that a criminal offence had been committed. The county is large, and grand juries are always desirous of obtaining an early discharge. And if the right assumed does not exist, the prosecution of offences, particularly those of a public nature, will become almost impracticable.

It is supposed that subpoenas are issued "in support of a prosecution," although the prosecution is thereby first instituted.

In this case the main objection is, not that the grand jury found the bill upon insufficient evidence, or that there was any informality in their proceedings, but that the witnesses were compelled to attend before them by process irregularly issued by the district attorney. It is submitted that this is no answer to the indictment. If the district attorney has transcended his powers, for that there may be some remedy against him, but it cannot be by impeaching a record of the court which is admitted to be true.

Complaints may originate before a grand jury. In all such cases the defendants may not have the same right of challenge as if they had been under recognizance. But in this case it is not alleged that any of the grand jurors were objectionable.

By the Court, S. B. STRONG, J. The defendant Conklin set up, as a separate defence, that he was a clerk in the store of French, and not a partner, and that he acted simply as

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such clerk and by direction of his principal in the delivery of the articles sold. This is very general, and cannot be considered as an allegation that Conklin sold the liquor in his capacity as clerk, and by the direction of his principal. If, however, that may be fairly implied from what is alleged, it does not constitute a valid defence. Nothing is said indicating compulsion; and he who willingly follows the direction of another in the perpetration of an offence cannot, for that cause, shield himself from responsibility. The law allows of no such excuse, nor should it.

Both defendants plead that there had been no preliminary proceedings against them before a magistrate, pursuant to the provisions of the statute (2 R. S., 706, §§ 2, 13, and *several following sections*). This formed no defence to the indictment, and must be deemed invalid as a plea. If there had been a fatal defect in the proceedings before the indictment was found, the defendants should have presented proof of the facts and moved to quash the indictment. The answer tendered no issue which could be tried by a jury. As, however, the action of the court below, in denying a motion to that effect, could have been reviewed, and the court actually passed upon the question involved, justice to the defendants would seem to call for its consideration by the court.

The provisions in the Revised Statutes, relative to the primary examination of persons accused of crimes, do not purport to limit the right of the people, through their officer, to institute accusations before the grand jury. They relate to charges preferred ordinarily by private individuals before inferior magistrates. In most cases, it is very proper that the persons charged should have a hearing before they are imprisoned or subject to the necessity of finding bail for their appearance. If the defendants are right in their supposition, that no case can be brought before the grand jury unless the magistrate shall commit the accused or put him under a recognizance, the determination of the magistrate to fully discharge him would be conclusive against the public.

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If he should grossly err or act from improper motives there would be no remedy. His determination would amount to an acquittal, for there is no provision for a re-investigation, nor could one be had if the previous examination should be invested with the immunities of a trial. It cannot be that the legislature designed that the public should be thus concluded by an informal investigation, and when it is not required that the officer entrusted with the management of criminal proceedings in behalf of the people should be present or have any notice of the proceedings.

The right of the people to commence proceedings for the punishment of crimes, before the grand jury, cannot be taken away by implication. To effect that requires a positive and direct prohibition. That is the general rule, and I can see no reason for departing from it in this important branch of jurisprudence.

There are several statutory provisions which imply that accusations for crime may, in the first instance, be preferred before a grand jury. Courts are required specially to charge grand juries to inquire into all violations of certain statutes. This would be improper and unnecessary if grand juries were limited to the examination of such cases only as had been previously before magistrates and were deemed by them proper for subsequent action. Grand juries are forbidden to disclose the fact of an indictment having been found against any person, for felony, not in actual confinement, until the defendant in such indictment shall have been arrested thereon. (2 R. S., 726, § 30.) There would seem to be no great, if any, necessity for this provision, if grand juries were confined to the examination of cases where the accused were in confinement or under recognizance. It is provided (2 R. S., 725, § 34) that if any offence shall be committed during the sitting of any court of oyer and terminer and court of general sessions, after the grand jury attending such court shall have been discharged, such court may, in its discretion, by an order, to be entered in its minutes, direct the sheriff to sum-

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mon another grand jury. But for what purpose, if nothing could be done until the case should undergo a preliminary examination before a magistrate? So, too, the power given to district attorneys, by the act of October 26, 1847, to issue warrants for the arrest of defendants under indictment, would seem to be unnecessary, if such indictment could be found only against prisoners or those who had entered into recognizance to appear in court and not depart without leave.

Upon the whole, I am satisfied that the objection which I have last considered is one of modern agitation, and that, like the generality of such objections, it has no solid foundation.

The judgment should be affirmed.

Judgment affirmed.

SUPREME COURT. Tompkins Special Term, April, 1856. Before
Balcom, Justice.

THE PEOPLE v. EDWARD H. RULOFF.

The question whether a former trial and conviction for abduction are a bar to an indictment subsequently found for murder alleged to have been previously committed, cannot be raised and made a ground for discharge on *habeas corpus*. Such defence can only be made available, if at all, on the trial of the indictment for murder.

ON *habeas corpus* to discharge the prisoner, Edward H. Ruloff, from the custody of the sheriff of Tompkins county, by whom he was confined in jail. The prisoner having been brought before the court, it appeared, by the sheriff's return to the writ, that he was imprisoned on an indictment for the murder of his wife, Harriet Ruloff, in one of the towns of Tompkins county, in June, 1845, and that the indictment was found by the grand jury of that county in 1848.

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It appeared, from the proof presented to the court, that in June, 1845, the wife of the prisoner disappeared from his residence in Tompkins county, and had never been found.

The prisoner was tried at the Tompkins Oyer and Terminer, in January, 1846, upon an indictment for unlawfully and forcibly abducting and imprisoning his wife, contrary to certain provisions of the Revised Statutes (2 *R. S.*, 664, § 28), and he was convicted upon such trial, and sentenced to imprisonment at hard labor, in the state prison at Auburn, for the term of ten years. And he had served such term.

After the prisoner was thus convicted, and before the term of his imprisonment in the state prison had expired, the indictment for the murder of his wife was found against him.

When his term in the state prison expired, the sheriff of Tompkins county took him from Auburn to the Tompkins county jail, where he had since been confined on the indictment for the murder of his wife.

The question arose on the trial of the prisoner for the abduction of his wife, whether he was guilty of murdering his wife or of her abduction; and the court charged the jury that if the evidence satisfied them that the prisoner had murdered his wife, they must acquit him of the crime of abducting her.

The prisoner was confined in the Tompkins county jail, at the time the indictment for the abduction of his wife was found, and he had never been at large out of the custody of an officer since that time.

The prisoner insisted that his trial, conviction and punishment for the abduction of his wife were a bar to all proceedings upon the indictment against him for her murder; and that he was entitled to a discharge from the custody of the sheriff of Tompkins county, without a trial upon the indictment for murder.

John A. Williams (District Attorney), for the people.

Edward H. Ruloff, in person.

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BALCOM, J.—If the prisoner murdered his wife, he committed such crime before he was indicted for her abduction; and on his trial for the latter offence the court charged the jury, if the evidence satisfied them that he had murdered her, they must acquit him of the crime of abducting her; but he was convicted of her abduction, and has been imprisoned ten years for that offence. He now claims that his trial and conviction for abducting his wife are a bar to all proceedings upon the indictment against him for her murder; but it is unnecessary to pass upon that question in this proceeding, for, were it conceded that his trial and conviction have the force which he claims they have, he could not be discharged on a *habeas corpus*. He must be regularly tried upon the indictment for murder. The effect of the former trial and conviction can be considered and determined only by the Oyer and Terminer that shall try him for the murder. It cannot be adjudicated in this proceeding by *habeas corpus*. (*Rex v. Acton*, 2 Str., 851; *S. C.*, 1 *Barnardist K. B.*, 250.)

The prisoner must therefore be remanded to take his trial in the Oyer and Terminer in the ordinary forms of law.

Ordered accordingly.

SUPREME COURT. Dutchess General Term, April, 1856. *Brown, S. B. Strong and Emott, Justices.*

THE PEOPLE *v.* ISAAC KAATZ.

The rule that larceny cannot be committed of goods accidentally lost, and of which the finder really supposes that the owner cannot be ascertained, is not applicable to cattle which have strayed from the inclosure of the owner upon the public highway; and where cattle were found upon the public highway, under such circumstances, and were driven by the finder to market, with the intention of converting them to his own use, he was adjudged guilty of larceny.

The presumption of dereliction, applicable to lost inanimate chattels, does not apply to stray domestic animals, as to which there is always supposed to be an *animus revertendi*.

When, on a criminal trial, the court was asked by the prisoner's counsel to charge "that the case being one of circumstantial evidence, the jury must acquit, unless the circumstances exclude every other reasonable hypothesis except that of the prisoner's guilt," and the court refused so to charge, it was held that no error was committed, it appearing that the case was not one of circumstantial evidence alone, but that there was also direct and positive evidence against the prisoner.

CERTIORARI to the County Sessions of Westchester county. The defendant, together with Gottlieb Milhelm and Anthony Foist, was indicted for grand larceny in stealing eight cows, the property of William Beaty and Lewis Morris. They pleaded severally not guilty, and the defendant demanded a separate trial. He was accordingly tried separately, on the 18th June, 1855, before the Hon. John W. Mills, county judge, and the justices of the sessions. There was evidence in the case, both positive and circumstantial, tending strongly to show that the defendant and the two persons jointly indicted with him as his confederates had taken the cows in question (which were the property of Beaty and Morris, as charged in the indictment), while they were on the highway, having strayed away, during the same night, from the pasture of the owners, and had driven them to the city of New-York, where they had butchered and sold them.

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When *George Reidinger*, a witness called by the prosecution, was on the stand, he was asked by the district attorney as follows: "Did you state, on a previous examination before the grand jury at White Plains, that Kaatz called you early in the morning, about daylight, to kill the cattle?"

This question was objected to by the counsel for the prisoner. The objection was overruled, and the prisoner's counsel excepted.

The witness answered: "No, I did not say so."

When *William Hicks*, a witness called by the prosecution, was under examination, he was asked by the district attorney as follows: "In the course of the conversation with Kaatz, did he or did he not tell you different prices at which he said he had bought the cattle of these persons?"

This was objected to by the prisoner's counsel, and the objection overruled; the prisoner's counsel excepted.

The witness then answered: "At one time he said he gave \$200 for them, and at the next time he said \$50 a head, and he repeated that he had paid \$50 a head."

Julia Kaatz, a witness called by the defence, proved that Milhelm received from Kaatz \$235 in paper, gold and silver.

She was then asked, by the counsel for the defence, the following question: "Do you know, from what took place at the time the money was paid, what it was paid for?"

This question was objected to by the district attorney, and the objection sustained; the prisoner's counsel excepted.

She was then asked by the counsel for the prisoner as follows: "Do you know whether Mr. Kaatz purchased any cattle that morning, and of or from whom?"

This was also objected to by the district attorney, and the objection sustained; the prisoner's counsel excepted.

The witness was then asked by the prisoner's counsel as follows: "Do you know whether Mr. Kaatz had purchased any cattle from Mr. Milhelm, the man to whom he paid the money?"

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This was also objected to by the district attorney, and excluded; the prisoner's counsel excepted.

Caroline Francke, a witness called on the part of the defence, was asked by the prisoner's counsel as follows: "Did you lend Mr. Kaatz any money on Tuesday morning, at or before the time you saw Milhelm in his room, and, if so, what amount?"

This was objected to by the district attorney, and the objection sustained; the prisoner's counsel excepted.

The witness was further asked as follows: "Did you lend Mr. Kaatz any portion of the money which you saw him pay to Milhelm, and, if so, what amount?"

"Do you know whether Mr. Kaatz had in his possession, of his own money, the sum of \$235, before seven or eight o'clock, or earlier, on Tuesday morning, the fifth of June?"

Both these questions were objected to by the district attorney, and the objection sustained; the prisoner's counsel excepted.

Isaac Meyer, a witness called on the part of the defence, testified that the general character of the defendant was good.

On his *cross-examination*, after stating where he had lived, and how long in each place, and that he was a butcher and drover, he was asked by the district attorney if he had a brother-in-law, and answered "Yes."

The district attorney then asked: "What is his business?"

This was objected to by the prisoner's counsel, and the objection overruled; the prisoner's counsel excepted.

The witness then answered: "He is a butcher and cow jobber; I am in business with him; I mean by that a drover."

It was proved by the prosecution that the prisoner said, in the presence and hearing of Milhelm and Foist, that he purchased the cattle from them, and that they did not contradict.

The court charged the jury upon the law and facts of the case; and, among other things, stated that he had been

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requested by the prisoner's counsel to charge that if the cattle had been found astray by the accused, and he had driven them away, not knowing who the owner was, it was not larceny, even though subsequently he converted them to his own use. He could not so charge the jury, but charged the jury that if the cattle escaped from the lots where they were at pasture, and were on the highway, still the person was guilty of larceny if he drove them to the city of New-York with the intent to convert them to his own use. To which portion of the charge the counsel for the prisoner then and there excepted.

The counsel for the prisoner then requested the court to charge that the two prisoners, Foist and Milhelm, not having denied the statement made by Kaatz in their presence, that he had purchased the cattle from them, it must be regarded as confirmation of the fact. The court refused so to charge, but left it to the jury to determine that point as a question of fact on the whole testimony, if Foist and Milhelm heard and understood what Kaatz had said on that subject. To which refusal the counsel for the prisoner then and there excepted.

The counsel for the prisoner also requested the court to charge that the case being one of circumstantial evidence, the jury must acquit, unless the circumstances exclude every other reasonable hypothesis except that of prisoner's guilt. The court refused so to charge, but charged the jury that it would be so in cases entirely of circumstantial evidence; but I do not think this is a case solely of circumstantial evidence; I think there is some positive evidence and circumstances connecting Kaatz with the cows; but you are to take the whole testimony into consideration, and be satisfied from the evidence that the prisoner Kaatz was the man or one of the men who stole the cattle, or he must be acquitted. To which refusal and charge the counsel for the prisoner then and there excepted.

The jury found the prisoner guilty.

Jonas B. Phillips, for the defendant.

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I. The court below erred in allowing the question put to Reidinger: First. Because it was leading and irrelevant; Second. Because it was in the nature of a cross-examination, with a view to the impeachment of the witness, called by the district attorney himself, to sustain the charge against the prisoner. (1 *Greenl. Ev.*, § 434.)

II. The question put to Hicks was also improperly admitted. It was leading and irrelevant.

III. The questions put to Julia Kaatz should have been allowed by the court, and the court erred in excluding them. The presumption of guilt arising from the recent possession of stolen property throws upon the accused the *onus* of explaining the manner by which it was acquired. In this case, the prisoner's offer to prove the acquisition by purchase was overruled by the court, in clear violation of the established rules of law and evidence applicable to cases of this character. (1 *Greenl. Ev.*, § 11; 2 *Archb. Cr. Pl.*; *Waterman's Notes*, 369, 6th ed.; *Rosc. Cr. Ev.*, 18; *State v. Merrick*, 19 *Maine*, 398.)

IV. The same objections apply to the exclusion by the court of the questions put to Mrs. Francke. (*Supra.*)

V. The question which the district attorney was allowed to propound to Isaac Myers was improper, even upon a cross-examination, and the answer was calculated unjustly to prejudice the case against the prisoner.

VI. The court erred in refusing to charge that if the cattle had been found astray by the accused, and he had driven them away, not knowing who the owner was, it was not larceny, even though he subsequently converted them to his own use; and further erred in charging the jury that if the cattle escaped from the lots where they were at pasture, and were on the highway, still the person was guilty of larceny if he drove them away to New-York, &c. Where property is lost in the highway, and it is found by a person not knowing the owner or having means at hand by which the owner can be ascertained, the subsequent conversion

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of such property by the finder to his own use does not constitute a larceny. (*Reg. v. Mole*, 1 Carr. & Ker., 417; 2 Arch. Cr. Pl., 387-7, 6th ed., et seq.; *Porter v. The State*, Murt. & Yerg., 226; 1 Hawk. P. C., ch. 31, §§ 1, 2; *The People v. Anderson*, 14 John., 293; *Whart. Am. Cr. L.*, 400, ed. 1846; *The People v. Cogdell*, 1 Hill, 94.)

VII. The statement made by the prisoner, in the presence and hearing of the defendants Milhelm and Foist, that he had purchased the cattle from them, not having been contradicted by them, should have been regarded, under the familiar rule of law, as a confirmation by them of the fact, and the court's refusal so to charge was error, although it would have been then for the jury to determine to what weight such evidence would have been entitled. At all events, it was the right of the prisoner to have had the rule stated to the jury; and for this error he is entitled to a new trial.

VIII. It is a well established and universally recognized rule that in cases depending upon circumstantial evidence, unless the circumstances exclude every other reasonable hypothesis except that of the prisoner's guilt, he is entitled to an acquittal. The court manifestly erred in refusing to charge upon this point as requested; and the expression of the opinion that this was not a case solely of circumstantial evidence was wrong, and an interference with the privilege of the jury. (1 *Greenl.*, 15, § 13.)

Edward Wells (District Attorney), for the people.

I. The questions put to the prisoner's witness, Julia Kaatz, by the prisoner's counsel, were correctly overruled: First. Because the questions sought for the declarations of the prisoner in his own behalf, after the theft was committed, and after the stolen property had been found in his possession and under his own control; Second. Because what took place in prisoner's house after the theft was committed was not necessary or proper to explain the previous facts, nor

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was it a part of the facts proved against the prisoner, and so not admissible as a part of the *res gesta*. (1 *Greenl. Ev.*, § 233.) 1. If these questions were proper, then the prisoner had the benefit of them immediately afterwards, when she was asked by prisoner's counsel to state all that took place at the time Kaatz paid the money to Milhelm, and whether she knew, from what then occurred, for what the money was paid; to which she answered, without objection from the district attorney: "I know no more about it, except the money, that he paid the money; saw no cattle." This question covered the whole ground of the question previously overruled; she told all she knew; and she was the prisoner's own sister. (2 *Graham on New Trials*, 672, 2d ed., 1855.) The questions put to Mrs. Francke, and objected to, were also properly overruled on the ground of irrelevancy. It made no difference where the prisoner got the money he paid to Milhelm.

II. The charge of the judge was correct, that if the cattle escaped from the lot where they were at pasture, and were there found by the prisoner, and driven to the city of New-York with the intent to convert them to his own use, he was guilty of larceny. The rule that the *bona fide* finder of lost chattels is not guilty of larceny, though he afterwards converts them to his own use, does not apply to live domestic animals like the cows in question. In the first case, as the chattels cannot return to their former owner, he is presumed to have abandoned them; and then, by the law of nature, they again become the property of the first finder; and although by the law of society he is permitted to reassert his property, yet in favor of the liberty of the *bona fide* finder, the presumption of dereliction remains, not to vest him with the property, but to clear him from crime. (*The People v. Anderson*, 14 *John.*, 300.) As to what is lost property, see 30 *Law and Equity Reports*, 525. But in the case of domestic animals, the absolute property being vested in the owner, and they having the *animus revertendi*, both the property and

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at least the constructive possession remain, though they should accidentally get upon the highway adjoining the lot where they were pastured. (2 *Bl. Com.*, 390; 1 *Chit. Ev.*, 314.) Taking from the constructive possession is larceny, as much as from the actual possession. (*Arch. Cr. Pl. and Ev.*, 362.) The essence of the crime of larceny consists in the felonious intent to appropriate the property, and if the prisoner drove them to New-York, from the place where they were in the road, with that intent, then the crime was complete. 1. The request of the prisoner's counsel was upon a purely abstract question of law, not applicable to any facts in the case. The cows had been shut up, the night they were stolen, in a securely inclosed field, and the gate fastened, and there was a total impossibility that they escaped, and no proof that they did; but on the contrary, the witness William Beatty testifies: "The fence was in good condition; the cattle could not get out." (1.) Under this evidence (and there is no other to this point) the jury would have no right to find that the cattle escaped; and hence, even if the judge's charge upon this point had been wrong, it is no ground for a new trial. (*Hayden v. Palmer*, 2 *Hill*, 206, 210; *Lyon, ex rel., v. Marshall*, 11 *Barb.*, 247.)

III. The court was correct in delivering the charge that the silence of Foist and Milhelm, when Kaatz said in their presence that he had purchased the cattle of them, was, as matter of law, confirmation of his statement. 1. Though their silence under such a statement (if they heard and understood it) might be evidence against them, on their trial, it cannot be evidence against the people on the trial of Kaatz. (1.) A prisoner's statements before a magistrate, when charged with the offence, are not evidence for him. (2 *Cow. & Hill's Notes to Phil. Ev.*, 156; 1 *Greenl. Ev.*, § 233.) 2. If their silence could be evidence in favor of Kaatz, yet the judge properly left it to the jury, as a question of fact on the whole evidence, to say whether Foist and Milhelm had heard and understood what Kaatz had said on that sub-

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ject: First. Because it does not appear what, if anything, Kaatz said, or whether in German or English, but merely that he identified them; Second. It is not in proof whether Foist and Milhelm heard or understood what was said. (1.) And if the judge had charged as desired, he would have had to assume those facts as proved, which he had no right to do. The request to charge was on a disputed fact, which was properly submitted to the jury, to which course no exception can be taken. (*Kelly v. Kelly*, 3 Barb., 420, 421; *Van Gorden v. Jackson*, 5 John., 467; *Frier v. Jackson*, 8 id., 507; *Law v. Merrills*, 6 Wend., 274.) (2.) As the evidence stood on this point, had the judge charged as requested, it would have been erroneous. (*Fitzgerald v. Alexander*, 19 Wend., 404; *McMorris v. Simpson*, 21 id., 614.) (3.) Besides this, the request to charge was upon a state of facts assumed to be positively proven and not denied; and if the judge was correct in declining to charge in that form, he was not bound to put a hypothetical case to the jury, that if they believed that Foist and Milhelm understood it, then their silence would be confirmation of the prisoner's innocence.

IV. The judge was correct in saying there was some positive evidence connecting Kaatz with the cows, and that it was not a case solely of circumstantial evidence; and as he charged that, in a case of circumstantial evidence, it must exclude every other reasonable hypothesis but that of prisoner's guilt, and as he told the jury to take the whole testimony into consideration, and be satisfied from the evidence that the prisoner Kaatz was the man, or one of the men, who stole the cattle, or he must be acquitted, a new trial should not be granted on this ground. 1. Kaatz was seen in company with Milhelm and Foist, driving the cows, at several different points: first, by the witness Peter McKeesker, at 126th-street, at two o'clock in the morning; second, by George Bingham, at 103d-street; third, by Thomas Marhem and Edward Graham, at 86th-street, at half-past two

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o'clock ; fourth, by John B. Brown, at Williamsburgh ferry, at five o'clock in the morning.

By the Court, EMOTT, J.—The principal question in this case arises upon the rule of law laid down by the court below in its charge, that if the cattle escaped from the lots where they were at pasture, and were on the highway, still the defendant was guilty of larceny if he drove them to the city of New-York with intent to convert them to his own use. This presents the question whether larceny can be committed of cattle which have accidentally broken out of an inclosure and are found in the highway by the person who abstracts them.

The rule that larceny cannot be committed of goods accidentally lost, or of waifs or estrays, was undoubtedly, as is observed by Thompson, C. J., in his dissenting opinion in *The People v. Anderson* (14 John., 299), the result of the theory that such goods were derelict or abandoned by the owner. Hence they became *bona vacantia*, and, by the law of nature, belonged to the first finder or occupant. Waifs, goods thrown away by a thief in his flight, are expressly recognized as abandoned by the true owner, unless he was immediately in pursuit, and in effort to apprehend the thief and to reclaim his property. (1 Conn., 296.) Estrays are defined to be animals found wandering and no man knoweth the owner of them ; and although, by the law of England, such property is claimed for the sovereign, still, until that claim was asserted and perfected with the prescribed formalities, there was no apparent owner or possessor of the property ; and therefore, as Lord Hale says (1 P. C., 510), larceny cannot be committed of such things whereof no man has any determinate property. The doctrine has been applied to estrays in cases where the animals are found in the property of another, and there is no case where any such presumption of dereliction has been made as to cattle accidentally escaping from the owner's close to the highway.

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The case of inanimate goods or chattels, lost by the owner and taken up by a person finding them in the road, is widely different in this particular from that of live animals escaped from an inclosure. Inanimate chattels cannot return or be restored to the true owner without the intervention of the finder, and the law does not compel him, at his peril, to pass on and leave them in the road or place where he discovers them. His taking them into his possession, therefore, is a perfectly lawful act; and he may intend to appropriate such articles to his own use, if the owner be unknown, and there be no marks on the property to point him out. If the finder subsequently continue or determine to withhold the property from the owner after he has been ascertained, still, that does not make his first act in taking possession of such chattels felonious, or even unlawful. Although, in such a case, there may be a subsequent conversion there is no original larceny.

But domestic animals are always presumed to have *animus revertendi*; and the fact that they have broken out of an inclosure, or are found at large in the highway, does not give any person meeting them a right to presume that the owner has lost them, and has no expectation of finding or reclaiming his property, as in the case of money or a pocket-book, or the like, accidentally dropped.

Besides, the doctrine we are considering is applied invariably with another qualification, which can hardly be supposed in such a case as the one at bar. The circumstances must at least be such as not to exclude the supposition of good faith in the taker of the property. Lord Hale (1 P. C., 506), after giving several cases and instances to illustrate the principle, lays down the rule that the taking of waif, estray or the like, must be when the party really believes them to be such, and does not attempt to color a felonious taking; and that the pretence of finding will not excuse one who takes goods with an unlawful intent from a place where they either lawfully or ordinarily may be. In the

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recent. English decisions the rule has been thus explained and applied, and the excuse of finding property is not allowed to prevent a conviction for larceny, unless the prisoner could really and honestly have believed that the property was lost and given up by the owner, and there were no apparent means of finding who that owner was. The rule was thus laid down by Baron Hullock, in 1 *Lewin* (p. 195), in reference to the taking of a horse straying on the highway, and by Cresswell, J., in a case where a man was convicted of larceny for taking sheep which he found in the road (*MS. case, cited in 2 Russ. on Cr.*, 12); and in a recent case, reported in 2 *Car & Kir.* (p. 839), Baron Parke thus states the result of the authorities: "The rule of law is, that if a man find goods that have been lost, or are reasonably supposed by him to have been actually lost, and appropriates them with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny; but if he has taken them with like intent, though lost or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny."

The American cases must be interpreted in the same way. *The People v. Anderson* (14 *John.*, 294), which is the leading case in our courts, was a case where the property, a trunk and its contents, was lost, that is, it had accidentally got out of the possession of the owner. He was ignorant where it was, had no apparent means of finding or recovering it, it was without any marks of his ownership, and he might be supposed to have temporarily, if not finally, abandoned the property and the hope of its return. The case is not an authority for extending the principle beyond cases where the property taken was, in a just sense, lost, and the party taking it really its finder. And a farther limitation is that the defendant must, or at least might, have believed, when he took the property, that it was lost and derelict, and there must be no means of indicating or discovering the owner apparent about the property.

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Cattle escaping from an inclosure, and wandering on the highway, are not within either condition. They cannot, indeed, be said to be lost, to have become undiscoverable, or to be abandoned by the owner. They may and probably will return, or, if not, they may be tracked and recovered, and cannot be assimilated to an inanimate chattel dropped or mislaid. Such a chattel, in that case, is not in the possession of any one, and, if not taken by some finder, will be destroyed, and come to no one's hands. The owner of these escaped cattle was still constructively in possession of them, and could have his action at once for any unlawful interference with that possession. Again, property which has such natural marks as cattle or live animals can never be considered as having no mark or sign about them by which their owner could be discovered or recognized, as may be the case with money, which has no earmark, or chattels which may be like a thousand others. No taking of live animals out of the highway, with intent to appropriate the entire dominion of them, can, therefore, be presumed or supposed to have been in good faith. The charge of the court below, on this point, was correct; and we have no doubt that there may be a conviction for a larceny in taking cattle or live animals which have escaped from an inclosure into a road.

The court was right in refusing to charge that the case being one of circumstantial evidence the jury must acquit, unless the circumstances excluded any other hypothesis except that of the prisoner's guilt, as that must necessarily have been predicated upon the assumption that the positive evidence which had been adduced was unworthy of credit.

The court erred, however, in rejecting the question whether the witness Julia Kaatz knew that the prisoner had purchased any cattle from Milhelm, who was seen driving the cattle in question on the night when they were stolen, and to whom the prisoner paid money the following morning. It is probable that the witness would have answered in the

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negative; but the prisoner had a right to put the question and have it answered. As he had been proved to be in possession of the stolen property, it was important for him to prove, if he could, that he had obtained it by purchase.

For that error the conviction must be reversed and a new trial ordered.

Ordered accordingly.

SUPREME COURT. New-York General Term, September, 1856.
Roosevelt, Clerke and Whiting, Justices.

THE PEOPLE *v.* ABRAHAM BOGART, Jr.

On the trial of a police justice of the city of New-York, for having willfully taken bail of and discharged from custody a person committed on a charge of larceny by another magistrate, without notice given to the district attorney, as required by the *Session Laws of 1846* (p. 408), it is competent for the prosecution to prove that, after such bail had been taken, search was made for the surety in the recognizance at the place of his alleged residence, and at other places, and that he could not be found.

If a police justice, in the city of New-York, willfully and intentionally take bail and discharge from custody a person committed on a criminal charge by another magistrate, without the notice to the district attorney required by the act of 1846, and without having before him the papers required by that act, he is guilty of a misdemeanor, under the provisions of 2 *Revised Statutes*, 696, § 89.

A police justice, in the city of New-York, acquires no jurisdiction, and has no authority to take bail and discharge from custody, till the preliminary steps required by the act of 1846 have been duly taken, and until such steps are taken his acts in taking bail and discharging from custody are not judicial acts, and cannot be protected as such.

In an indictment of a police justice for such an offence, it is not necessary to prove that the act was done corruptly. The statute is violated and the penalty incurred, if the act be done intentionally.

"Straw bail," defined by the city judge in his charge to the jury.

Form of a writ of *certiorari* to remove a cause from the Court of General Sessions of the Peace of the city of New-York, to the Supreme Court, after verdict and before sentence.

Form of an indictment against a justice of the peace for a misdemeanor, in willfully admitting a prisoner to bail, in the city of New-York, without notice to the district attorney, in a case in which the defendant was not the committing magistrate.

Form of a commitment, by the recorder of New-York, of a person indicted in the Court of General Sessions for grand larceny.

Form of a commitment, by a police justice, of a person charged before him with grand larceny.

Form of a recognizance, taken by a police justice, to appear and answer to an indictment, in the Court of General Sessions, and of a justification by the surety in the recognizance.

Form of a recognizance, taken by a police justice, on a charge made before him of grand larceny.

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THIS cause was brought up on a writ of *certiorari*, of which the following is a copy.

The People of the State of New-York, to the judges of the Court of General Sessions of the Peace, in and for the city and county of New-York, greeting :

We, being willing for certain causes to be certified, as well of a certain indictment, plea, with the bill of exceptions, verdict, and other proceedings thereon before you, against Abraham Bogart, Jr., at the suit of the people of the State of New-York, on a charge of misdemeanor done and committed by the said Abraham Bogart, Jr., command you, that you send to our Supreme Court of judicature of the people of the State of New-York, to be held at the City Hall, in the city of New-York, on the first Monday in May next, the indictment, plea, verdict and bill of exceptions, aforesaid, and other proceedings thereon, with all things touching the same, as fully and entirely as they remain before you, by whatsoever name the parties may be called therein, together with this writ, that our said court may further cause to be done thereupon what of right our said court shall see fit to be done.

Witness, James I. Roosevelt, Esq., presiding justice of our said court, at the City Hall, in the city of New-York, the twenty-second day of April, in the year one thousand eight hundred and fifty-six.

[*Per curiam.*] RICHARD B. CONNOLLY, *Clerk.*

A. OAKLEY HALL, *District Attorney.*

By the return to the writ it appeared an indictment, of which the following is a copy, had been found in the court below :

City and County of New-York, ss :

The jurors of the people of the State of New-York, in and for the body of the city and county of New-York, upon

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their oath, present : That Abraham Bogart, late of the first ward of the city of New-York, in the county of New-York, aforesaid, junior, on the twenty-eighth day of July, in the year of our Lord one thousand eight hundred and fifty-five, at the ward, city and county aforesaid, with force and arms, acted as and was, and yet acts and is, one of the police justices for the city of New-York. That he, the said Abraham Bogart, Jr., as police justice as aforesaid, was prohibited by law from letting to bail any person charged with a criminal offence in any case wherein he, the said Abraham Bogart, Jr., was not the committing magistrate, unless notice of the application to bail such person should have been given to the district attorney of the city and county of New-York at least two days before such application, specifying the name, the officer, the time and place when and where such application would be made, and the name and residence of the proposed bail, and the original commitment, and proofs upon which it was founded, should have been presented to him, as fully appears by the eighth section of an act passed May thirteenth, one thousand eight hundred and forty-six, entitled "An act to amend an act entitled 'An act for the establishment and regulation of the police of the city of New-York,'" passed May the seventh, one thousand eight hundred and forty-four, and in the words following : "No officer other than the committing magistrate shall let to bail any person charged with a criminal offence, unless notice of the application to bail such person shall have been given to the district attorney of the city and county of New-York at least two days before such application, specifying the name of the officer, the time and place when and where such application will be made, and the name and residence of the proposed bail, and the original commitment and proofs upon which it is founded shall have been presented to the officer to whom the application for bail is made. The person having the custody of such commitment and proofs shall, when required in writing, produce the same before the officer last mentioned."

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That while such law was in force and in effect, one William Nambe, otherwise called William Lambe, was indicted in the Court of General Sessions of the Peace in and for the said city and county of New-York, on the fourth day of April, one thousand eight hundred and fifty-five, for the crime of grand larceny, in feloniously stealing, taking and carrying away the goods, chattels and personal property of one James E. Miller, and thereafter, on such indictment, was committed to the custody of the keeper of the city prison, to await his trial on such indictment by a magistrate of the city and county of New-York, viz., James M. Smith, Jr., Esq., recorder of the city of New-York. That whilst the said William Nambe, otherwise called William Lambe, stood committed, as aforesaid, by the said James M. Smith, Jr., Esq., recorder as aforesaid, the said Abraham Bogart, Jr., well knowing such law aforesaid, with force and arms, at the ward, city and county aforesaid, on the twenty-eighth day of July, in the year of our Lord one thousand eight hundred and fifty-five, did, willfully, unlawfully, maliciously and corruptly, admit to bail said William Nambe, otherwise called William Lambe, as appears by the said recognizance, to answer then and there, by the said Abraham Bogart, Jr., police justice, taken in the words and figures following, to wit:

City and County of New-York, ss:

Be it remembered, that on the twenty-eighth day of July, one thousand eight hundred and fifty-five, William Nambe, *alias* Lambe, of number , Brooklyn, Nassau-street, in the city of New-York, and Joseph Porkousky, of number two hundred and ninety-eight Houston-street, in the said city, personally came before me, the undersigned, one of the police justices in the city of New-York, and acknowledged themselves to owe to the people of the State of New-York, that is to say, the said William Nambe, *alias* Lambe, the sum of ten hundred dollars, and the said Joseph Porkousky the sum of ten hundred dollars, separately, of good and lawful

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money of the State of New-York, to be levied and made of their respective goods and chattels and tenements, to the use of said people, if default shall be made in the condition following, viz.: Whereas, the said William Nambe, *alias* Lambe, was indicted in the Court of General Sessions, for having committed the crime of grand larceny in the city and county aforesaid; and whereas he has been brought before said justice to answer said charge, and upon the examination of the whole matter, pursuant to statute, it appearing to said justice that said offence has been committed, and there is probable cause to believe said defendant to be guilty thereof, and the said offence being bailable by said justice, he did thereupon order the said defendant do find sufficient bail in the sum of ten hundred dollars to answer to any indictment to be preferred against him for said offence: Now, therefore, the condition of this recognizance is such, that if the abovenamed William Nambe, *alias* Lambe, shall personally appear at the next Court of General Sessions, to be held in said city and county on the first Monday of August next, to answer any indictment that may be preferred against him for said offence, and abide the order of the said court, and not depart therefrom without leave, then this recognizance to be void, otherwise to remain in full force.

WILLIAM LAMBE,
JOSEPH PORKOUSKY.

Taken and acknowledged before me, }
this day and year aforesaid. }

A. BOGART, Jr., *Police Justice*.

City and County of New-York, ss:

Joseph Porkousky, the within named bail, being duly sworn, says, that he is a householder in said city, and is worth ten hundred dollars over and above the amount of all his debts and liabilities, and that his property consists of three lots of land in Morrisania, valued at fifteen hundred dollars, and

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stock in trade insured for two thousand dollars in the City Insurance Office in this city.

JOSEPH PORKOUSKY.

Sworn before me this 28th }
day of July, 1855. }

A. BOGART, Jr., *Police Justice*.

And then and there, after such recognizance being taken by him, did discharge from custody the said William Nambe, otherwise called William Lambe, he, the said Abraham Bogart, Jr., then and there well knowing that the said William Nambe, otherwise called William Lambe, then and there stood committed, as aforesaid, by the said James M. Smith, Jr., Esq., recorder, as aforesaid, and that he, the said Abraham Bogart, Jr., was not the committing magistrate, and then and there well knowing that no notice of the application to bail said William Nambe, otherwise called William Lambe, had been given to the district attorney of the city and county of New-York, and that the proofs upon which said commitment was founded had not been presented to him, the said Abraham Bogart, Jr., police justice, as aforesaid, upon said application to bail. And the jurors aforesaid do say, that notice of the application to bail said William Nambe, otherwise called William Lambe, had not been given to the district attorney of the city and county of New-York, and that the proofs upon which the commitment was founded had not been presented to the said Abraham Bogart, Jr., police justice, as aforesaid, upon said application to bail.

Wherefore the jurors aforesaid, upon their oaths aforesaid, do say, that the said Abraham Bogart, Jr., police justice, as aforesaid, did, willfully, maliciously, unlawfully and corruptly, an act prohibited by law, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

A. OAKLEY HALL,
District Attorney.

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The defendant pleaded not guilty, and the issue so joined came on to be tried on the 6th day of February, 1856, in the Court of General Sessions, before Elisha S. Capron, city judge, and a jury.

John S. Magnus, on behalf of the prosecution, testified as follows: I was present July 28th, 1855, when Justice Bogart, acting as police justice, bailed William Nambe; it was about eleven o'clock in the morning; the bail was taken in the large room; the justice requested me to write out the recognizances; the prisoner was not there; the man who went bail was there; there was a number of persons present; I cannot now say who they were; there were two commitments, as follows:

City and County of New-York, ss:

By James M. Smith, Jr., Esq., the recorder for the city of New-York, to the policemen and constables of the said city, and every of them, and to the keeper of the city prison of the said city:

These are, in the name of the people of the State of New-York, to command you, the said policemen and constables, and every of you, to convey to the said prison the body of William Nambe, *alias* Lambe, and deliver him to the keeper thereof; and you, the said keeper, are hereby commanded to receive into your custody, in the said prison, the body of the said Nambe, *alias* Lambe, who stands indicted in the Court of General Sessions with having committed the crime of grand larceny, in the city and county aforesaid; and that you safely keep the said Nambe, *alias* Lambe, in your custody, in the said prison, until he shall find sureties to answer the said charge in the sum of ten hundred dollars, or shall be thence delivered by due course of law.

Given under my hand and seal, at the new City Hall, in
[L. s.] the said city, this eighteenth day of July, one thousand eight hundred and fifty-five.

JAMES M. SMITH, Jr., *Recorder*.

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City and County of New-York, ss :

By Abraham Bogart, Jr., Esq., one of the police justices in
and for the city of New-York, to the constables
[L. s.] and policemen of the said city, and every of
them, and to the keeper of the city prison of
the said city :

These are, in the name of the people of the State of New-York, to command you, the said constables and policemen, and every of you, to convey to the said prison the body of William Nambe, *alias* Lambe, *alias* William Lawson, and deliver him to the keeper thereof; and you, the said keeper, are hereby commanded to receive into your custody, in the said prison, the body of the said William Lawson, who stands charged before me, on oath of Benjamin F. Weymouth, with having, on the seventeenth day of July, one thousand eight hundred and fifty-five, at the city of New-York, in the county of New-York, feloniously taken, stolen and carried away, from the pocket of said Weymouth, and his property, one portemonnaie, containing bank bills and gold coin, value in all of fifty-one dollars; and that you safely keep the said William Lawson in your custody, in the said prison, until he shall find surety in the sum of ten hundred dollars to answer said complaint, or be thence delivered by due course of law.

Given under my hand and seal, this eighteenth day of July, one thousand eight hundred and fifty-five.

A. BOGART, Jr., *Police Justice.*

The witness continued: The prisoner was sent for, but I did not see him; the man who offered bail was sworn to answer such questions as might be put to him touching his property; he was asked by Judge Bogart for his reference; he said he was acquainted with Alderman Francis, of the tenth ward; there was no counsel representing the prisoner that I knew; I was not there when application for bail was made; I do not know what occurred before I was there.

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The said two commitments were then read in evidence by the district attorney, and also the recognizances, as follows :

The district attorney then read in evidence a recognizance, with an affidavit of justification annexed, in the same words and figures as in the copy set forth in the indictment.

The district attorney next read in evidence a recognizance, with an affidavit annexed, of which the following is a copy :

City and County of New-York, ss :

Be it remembered, that on the twenty-eighth day of July, in the year of our Lord one thousand eight hundred and fifty-five, William Nambe, *alias* Lambe, *alias* William Lawson, of number —, ——— street, in the city of New-York, and Joseph Porkousky, of number two hundred and seventy-eight Houston-street, in the said city, personally came before the undersigned, one of the police justices in the city of New-York, and acknowledged themselves to owe to the people of the State of New-York, that is to say, the said William Nambe, *alias* Lambe, *alias* William Lawson, the sum of five hundred dollars, and the said Joseph Porkousky the sum of five hundred dollars, separately, of good and lawful money of the State of New-York, to be levied and made of their respective goods and chattels, lands and tenements, to the use of said people, if default shall be made in the condition following, viz.: Whereas the said William Nambe, *alias* Lambe, *alias* William Lawson, was charged before the undersigned police justice, as aforesaid, on the oath of Benjamin F. Weymouth, for having, on the seventeenth day of July, one thousand eight hundred and fifty-five, in the city and county of New-York aforesaid, feloniously taken, stolen and carried away from the pocket of said Weymouth, and his property, one portemonnaie, containing bank bills and gold coin of the value, in all, of fifty-one dollars; and whereas he has been brought before said justice

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to answer said charge, and upon the examination of the whole matter, pursuant to statute, it appearing to said justice that said offence has been committed, and that there is probable cause to believe said defendant to be guilty thereof, and the said offence being bailable by said justice, he did thereupon order the said defendant to find sufficient bail in the sum of ten hundred dollars for his appearance at the next Court of General Sessions, to be held in said city and county, to answer to any indictment to be preferred against him for said offence: Now, therefore, the condition of this recognizance is such, that if the above named William Nambe, *alias* Lambe, *alias* William Lawson, shall personally appear at the next Court of General Sessions, to be held in said city and county on the first Monday of August next, to answer to any indictment that may be preferred against him for said offence, and abide the order of the said court, and not depart therefrom without leave, then this recognizance to be void, otherwise to remain in full force.

WILLIAM LAWSON.

JOSEPH PORKOUSKY.

Taken and acknowledged before me, }
the day and year aforesaid. }

A. BOGART, Jr., *Police Justice*.*City and County of New-York ss :*

Joseph Porkousky, the within named bail, being duly sworn, says, that he is a householder in said city, and is worth ten hundred dollars over and above the amount of all his debts and liabilities, and that his property consists of three lots of land in Morrisania, Westchester county, and stock in trade insured in the city of New-York for two thousand dollars, value, in all, thirty-five hundred dollars.

JOSEPH PORKOUSKY.

Sworn before me, this 28th }
day of July, 1855. }

A. BOGART, Jr., *Police Justice*.

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The witness, being *cross-examined* by counsel for defence, further testified: I am now an attorney and counselor in this city; I have been a policeman in the sixth ward; I have been attached to the police about sixteen years; I have known Justice Bogart about twenty-five years; I have been intimate with him all that time; Justice Bogart at the time referred to was attached to the Tombs Police Court; the business there is very large; the magistrates have a crowd around them nearly all the time; they have to use rapid dispatch; I have often written there for the justices; I wrote for them almost every day; there was nothing singular in Justice Bogart asking me to fill up these bonds; I saw as much of the man who offered bail as Justice Bogart did; he looked like a gentleman; I had never seen him before; I have been very intimate with the criminal business of this city; I know the sort of men who become straw bail; I never saw this man before; there was nothing suspicious in his appearance; they are sometimes very short of clerks at the Tombs Court, and there is nothing unusual for others, like myself, to write there; it is not an unusual thing for magistrates at the Tombs to take bail for persons committed at the Court of General Sessions; in the manner in which the bail was taken, there was nothing, in my mind, the least suspicious.

Robert Johnson, on behalf of the prosecution, testified as follows: I have been a police clerk for six years; I have generally acted at the Tombs; Justice Bogart has been four years in office; Nesbitt was the clerk there from ten A. M. to two P. M.; during that time I was at the Mayor's office; my impression is I was not at the Tombs; I was not at the Tombs when the bail was taken; the clerks at the Tombs were Mr. Nesbitt and sometimes myself; I was shown the recognizance in question by Justice Bogart; he said he had taken it in a case where the party had been committed by Recorder Smith, but he thought he had the right to take the bail; I told him I thought he had no right to take it unless

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he had a notice from the District Attorney ; I do not recollect any further conversation, except that I told him the prisoner was known to be a notorious pickpocket, and that he should be cautious ; it is the general custom for police justices, in taking bail for indictments, to consult the committing officer or the district attorney.

Cross-examined by counsel for defence : Officer Patterson used to take down examinations at the Tombs Court in the place of the regular clerks ; others assisted the magistrate in taking examinations and making out papers ; I did not see the party who offered bail in this case ; frequently examinations are going on in two or three rooms at once.

James Nesbitt, called as a witness for the prosecution, testified as follows : I was a police clerk at the Tombs last summer ; I had no conversation with Judge Bogart on the subject of bailing Nambe ; I was not present at the time.

Cross-examined by counsel for defence : It often happens that the clerks are called away on business, and that officers are required to write bonds for them ; I have known counsel to fill up a bond himself ; it would not be unusual for Mr. Magnus to fill up a bond, as he did in this instance.

Francis Spicer, on behalf of the prosecution, testified as follows :

The District Attorney here offered to prove by the witness that he, the witness, had made search for the said Porkousky at 278 Houston-street, in this city, and other places, and was unable to find him the said Porkousky.

This evidence and each and every part thereof was objected to on the ground that it was inadmissible under the indictment ; also on the ground that it was in any event incompetent as against the defendant, unless it was shown that defendant was aware, at the time he took the said bail, he the said Porkousky did not reside at the place above mentioned. The court admitted the evidence, and the counsel for the prisoner excepted.

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Examination resumed. I was attached to the district attorney's office during last summer; I went to No. 278 Houston-street to search for Mr. Porkousky, the bail in this case; I did not find Porkousky, or any person of a similar name, neither at 278 Houston-street nor anywhere in the neighborhood; I could not find that he had ever lived there.

Counsel for defence said that the defence had also made strenuous exertions to find Porkousky, and had failed, and he was willing to admit that he was not what he represented himself; he was also willing to admit that the party had been bailed without notice to the district attorney, and that the Court of Sessions had adjourned at the time bail was taken.

Cross-examined by counsel for defence. When I have arrested parties on bench warrants from the Court of Sessions, I have often taken them before the police magistrates after the Court of Sessions had adjourned.

The District Attorney here read a letter dated August 5, 1856, calling Judge Bogart's attention to the matter, and also the original affidavit taken before Justice Bogart upon which Lambe was committed by him.

The prosecution having rested:

James Martin was called for the defence, and testified as follows: Judge Bogart called on me, and told me to use all exertions to have Nambe rearrested, and if he was rearrested he would give a reward; this was about middle or latter part of August, 1855.

Ralph Patterson, for the defence, testified as follows: I am attached to the Tombs Police Court; I remember the bail being taken in this case; I was present when one of the affidavits was taken; I saw the man who was bailed; I tried to find him at Judge Bogart's direction; the judge told me to look out for him and arrest him; this was about five days after the bail was taken.

By District Attorney. I was not told to look after Porkousky.

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By counsel for defence. It is very common at that court for the magistrates to be so much engaged that three or four clerks and police officers have to write for them; it is a common thing for the sitting magistrate to have examinations going on in one room while he has to go to and fro into other rooms to answer questions.

Stuart J. Smith, on behalf of the defence, testified as follows: I have been a police officer for eight years; I was at the Tombs Court last summer, after the bail was taken in this case; Judge Bogart gave me orders to rearrest the man Nambe; I was sergeant of a police squad, and he told me to instruct my men to arrest him; I think he told me to rearrest about a week after the bail was taken; I was an officer of Judge Bogart's court, and considered his orders in this respect, and in any other, binding upon me; I made every exertion personally, and through the policemen under my charge, to rearrest Nambe, but failed to find him.

The counsel for the defence and prosecution respectively summed up the case to the jury, after which Judge Capron charged the jury as follows:

Gentlemen of the jury: Notwithstanding a long time has been occupied in the trial of this cause, I do not myself think that it involves any principles that are abstruse. The facts are but few, and the law that applies to them is, in my judgment, very simple. Before I begin to state what appears to me to be the law of the case, it is, perhaps, proper that I should repeat what I said upon the trial of a cause at the last term of this court, which is somewhat similar in its character: that this is not the most serious offence that a man can be charged with; it does not involve his life, but it does his reputation to a considerable extent. It may involve his liberty, and may affect his political prospects, inasmuch as it affects his general character, and it is therefore highly important that you should weigh the facts can-

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didly and carefully. You should not come to any hasty conclusion, but fairly weigh all the testimony in the case, and give every circumstance in favor of the defendant its full weight; because a citizen who has stood well in the community, who has been clothed with public office, and intrusted with the enforcement of public justice, is presumed to have held a good position in society, and he should not be struck down from that position except upon very clear evidence. It is of no use laboring to acquire good character and an honorable standing in society if a very little evidence, something that perhaps a party cannot explain at the moment, is to strike him down and destroy his prospects forever. You should, therefore, in this case, when you retire to consult with each other in respect to it, give to the defendant the benefit of every presumption in his favor. But there is another rule which it is your duty to observe. You should not allow your sympathy for the defendant, at the same time that you are anxious to give him the benefit of every doubt, and full weight to every piece of evidence that bears in his favor, to blind you to the real state of the case, because the public, gentlemen, have an interest in this question as well as he. The public have intrusted him with the exercise of certain duties for the public benefit and safety. He is a criminal officer. He is appointed, as it were, between the public and those who violate the law, for the protection of the public. His duty is to see that those who are brought before him suspected of crimes, and especially if they are indicted, are not let loose upon the community, under circumstances which may lead to their escaping trial and escaping justice, and those who become bail for them suffer nothing, because they are worth nothing.

At the same time that you regard all the rights of the defendant, and give him the benefit of all the doubts that exist in your minds as to the question of his guilt, you will remember that you are also the guardians of the public; and if the case is clear, if it is so clear that you have no reason-

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able doubt upon the question of his guilt, you should allow no sympathy that you may have for him to prevent you from finding him guilty, because the betrayal of an official trust is one of the most heinous crimes that can be committed. We frequently do not think it is. We think it is a small matter when judicial or executive officers, who are intrusted with official acts, accept a bribe, or from corrupt motives let a prisoner run at large; but it is a very serious charge. A man may occupy but an humble office, and his derelictions of duty may not be very serious; yet when the public once get accustomed to that kind of conduct upon the part of public officers, some other official, who has high public interests intrusted to his charge, may, by-and-by, violate his duty, and the community may feel seriously the effect of his conduct and the danger of intrusting power to men who do not deserve it. The governor of the state, or some high judicial officer of our courts, may, if the public become insensible to the importance of judicial duty and fidelity, commit some great wrong, and hence it is just as important that fidelity in public office should be exacted among the lowest grade of officers in the state as it is among the highest. Therefore, gentlemen, when you come to consider this case, do not let any sympathy for the defendant deter you from finding him guilty of the crime imputed to him, if you have no reasonable or intelligible doubt that he is guilty.

Here is another consideration: I mention it because the jury, that I had reference to when I mentioned the other case, canvassed the question (as I heard since) how much punishment should be inflicted upon the defendant if found guilty. That was an improper inquiry. It gave to the court as well as to every one else the idea that the jury thought he was guilty, and only refused to find him so because they did not know his punishment. That, gentlemen, is not a question for you, but one entirely for the court. If the defendant should be found guilty, the punishment cannot extend beyond a year's imprisonment in the county jail and a fine

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of \$250; but it may run as low as one hour's imprisonment and a fine of one cent. The court have the discretion of inflicting a fine from one cent up to \$250, or imprisonment from half an hour up to one year; and it is fair to be supposed that the court, in the exercise of a proper judgment, will always apportion the punishment to the circumstances of each particular case. The jury should therefore have no regard whatever to that consideration, leaving to the court the exercise of the discretionary power which the law has confided to it, confining themselves to the mere determination of guilt or innocence. Now, gentlemen, the defendant here is proved to be a police magistrate; a very important officer in this community, and one who has more to do with the administration of justice, so far as the public peace is concerned and the safety of citizens, than any other class of officers in the city; therefore, it is highly important that they should be intelligent and honest. The people charge him under the thirty-ninth section of the statute, which reads: "Where the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, either in the same section containing such prohibition or in any other section or statute, the doing such act shall be deemed a misdemeanor." In other words, the act is a misdemeanor, whether committed by an officer or anybody else who is prohibited by law from doing that act. Now, it cannot make any difference whether the individual is an officer or a private citizen; because if an officer does an act beyond his jurisdiction, and therefore contrary to law, he cannot be said to do it officially, and therefore it is out of his office. An officer has two relations: he is a private citizen and an officer. What he does in his official capacity, and within his jurisdiction, he does as an officer, but what he does not in his official capacity, or where he has no jurisdiction, he does not as an officer. Therefore, in my opinion, the act covers the case of an officer as well as of a private individual, upon the ground that what

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he does, if forbidden by law, is not an official duty at all, any more than if done by a man who did not hold the office. When the performance of an act is prohibited by statute, it is a misdemeanor, and the person committing it is liable to the punishment I have stated. Now, the people say that the defendant violated this law, which says: "No officer, other than the committing magistrate, shall let to bail any person charged with a criminal offence, unless notice of the application to bail such person shall have been given to the district attorney of the city and county of New-York, at least two days before such application, specifying the name of the officer, the time and place when and where such application will be made, and the names and residence of the proposed bail, and the original commitment and proofs upon which it is founded, shall have been presented to the officer to whom application for bail is made." Gentlemen, you can see the great propriety of this law. In this city there are many committing magistrates. A warrant is issued; the criminal is brought up before a committing magistrate, who takes his examination and commits him to prison. If application is made to that same individual to let him out on bail, he can judge whether he should be let to bail, and in what sum. He knows the history and character of the case, and therefore, in law and in fact, is better able to judge of the proper amount of bail which should be taken, and who would be good bail, than any magistrate who had not had the case before him. A great deal of evil resulted in this city from magistrates committing persons charged with a crime, and then the friends of the prisoner going to another justice, who was a perfect stranger to the case, and giving bail in perhaps a nominal sum, when the offence was one which required bail to be taken in a large amount; and it may be he omitted to go before the officer who committed him because it was such a case, and they wanted to get off more easily. That is the reason why the statute was passed, and it is an important act. "No officer shall let to bail."

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That is a complete prohibition on every officer except the magistrate who committed the individual to prison, unless notice is given to the district attorney, and unless the officer to whom the application is made has the original commitment and proofs before him, to look at, upon which the prisoner was arrested by the other magistrate and committed to jail. The reason of this provision is, that it may often happen that the same officer who committed the prisoner may be away, sick or dead; and it will therefore be necessary, from various causes, to go before some officer who did not cause the arrest to be made. But this statute provides that no other officer shall do it, unless the district attorney has two days' notice of the fact, so that he can look into the case and understand it, and unless the original papers upon which the arrest and commitment were made are brought before the officer to whom the application is made for bail. These papers inform the officer what is the nature of the case, and he can act intelligently. This statute, therefore, prohibits any officer the right to take bail where another officer has made the commitment, without these papers are presented; and my construction of the law is this: that although an officer like Mr. Bogart may have general authority to let to bail, yet this statute gives him no jurisdiction over a case, which another officer originally had, without the production of the papers upon which the arrest was made, the complaint, and the proofs. If he does not get them, he has no more jurisdiction over a party or a case than a common justice of the peace has, who undertakes to render judgment against a man without a summons issued and returned duly served. He is prohibited from doing the thing until these papers are produced. If he does it, therefore, he does it, not as a justice, because he has no jurisdiction in the case as a police justice, without the possession of these papers in the first place; he does it as a private individual, and any other man has just the same right he has to let to bail. The bail taken probably

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would be good, and the person who became bail would be held. But that is a question I have not heard agitated, and do not know that it has been decided. All that, however, is no answer to the question whether he had any right to act at all, so far as he is concerned, when he is called to account for what he has done contrary to the statute. Now, the people say that this officer, on the twenty-eighth July last, let to bail a prisoner, whose name has been mentioned to you, and who had been previously, upon the eighteenth day of the same month, consigned to prison under a commitment issued by Recorder Smith. If the charge presents a case precisely within the eighth section, Recorder Smith committed the man to prison. The papers were upon file. The defendant is charged with having let him to bail without giving any notice to the district attorney upon the subject, and without having before him the necessary papers to give him jurisdiction in the case. He had the commitment, and not the proofs; but the statute is not satisfied without the whole. The commitment was not a matter of much importance, so far as taking bail was concerned; but the proofs, to give the officer a knowledge of the case, were the great things required. It is not denied, I believe, gentlemen, that Mr. Bogart did this act. They admit that he issued a warrant against the same man, who was brought up before him upon a complaint made before him. Now, he had a right to take that complaint and the examination, and, if the case was made out, he had a right to let him to bail without giving any notice to the district attorney, because it was a case where he himself had caused the arrest. The complaint had been made before him, and therefore that was not a case coming within this section. Under the complaint filed before him, and under the warrant issued by him, he had a right to bring this man up, hear his case, commit him to prison, or let him to bail. But the charge is, that when application was made to let him to bail, it was not upon his case only, but upon Recorder Smith's, and the charge is upon that act,

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an exercise of power with which he was not clothed, in taking bail of this man and setting him at liberty. And further, it is urged that this bail was what is called straw bail; in other words, that the bail had no real estate, that there was in fact no such man, and that he was not to be found. That circumstance, however, is not material, any further than to show the general nature of the whole transaction; it does not form an element in the offence.

In coming to a conclusion, gentlemen, upon the guilt or innocence of Justice Bogart, a great deal has been said by the counsel upon both sides as to what was necessary to constitute guilt. My own opinion is, and I think it is borne out by the authorities, that where an act is forbidden and a party does that act, he is guilty of the offence, he is guilty of a misdemeanor; that it is not necessary, under this statute, to prove corruption, even in the case of a public officer, charged with doing an act without having acquired jurisdiction in the ordinary literal acceptance of the term as we understand it; but, if he intended to do the act, his intention constitutes all that is necessary to be proved. If a man does an act intentionally, he does it willfully. Intention means will. When I intentionally do a thing, I do it because I will to do it. If this were a judicial act, then I think it would be necessary to show something further than just the doing of the act. But it is a ministerial act. The whole of Justice Bogart's duty, until he had acquired jurisdiction, was ministerial; like a justice issuing a summons and having it returned to him with the proper return indorsed. That is a ministerial and not a judicial act. His judicial duty did not commence until he could entertain the question of bail. He could not legally entertain that question until he got the papers, because the statute says he shall not act until he gets them. Then he cannot do a judicial act until he gets the papers. The act for which Justice Bogart is indicted is, taking bail without the prior performance of a necessary jurisdictional ministerial act. It is a general

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rule that, when a public officer is indicted for misbehavior in his office, and when the act done is clearly illegal, it is not necessary, in order to support an indictment, to show that it was done with corrupt motives. Nothing can be plainer. The question is, was this a judicial or a ministerial act? I charge you, gentlemen, that it was wholly ministerial; that all his acts are ministerial until he acquires jurisdiction in the case, and he does not acquire jurisdiction until he has before him all the papers which the eighth section requires before his right to act attaches. That is too plain to admit of any doubt. Here we have the law where the act was illegal, and certainly it was illegal for him to take bail without having these papers and giving this notice. Where it is illegal, the proof of doing the act is evidence of a bad motive, and constitutes the offence. The question may arise, whether the defendant has the right, by proof upon his part, to show that he had no bad motive. The question for the jury is, was it illegal for him to take this bail without having these papers? Did he do that act? You will remember, gentlemen, that Justice Bogart has for several years been a judge, and these statutes he must have had occasion to know all about, for they concerned his everyday duties. It may be that he was unaware of the full force of this statute. It may be that he did not understand it; and that you may take into consideration, under all the circumstances, if there is any evidence tending to prove that fact, with the view to rebut the presumption of bad intention, arising from the doing of the act.

You will remember, by Mr Johnson it is proved that, shortly after that act, he mentioned the fact to Mr. Johnson, stating that he had let this man to bail. Johnson told him he thought he had done wrong, but he (Bogart) thought he was right. It is for you, gentlemen, to say, from the fact of Bogart mentioning this to Johnson, whether you may infer it had been the subject of conversation before. Johnson says, "I think you have done wrong." Perhaps he may

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have talked the matter over before. Whatever you find upon that subject, it is submitted whether that is not evidence of an understanding, upon the part of Mr. Bogart, about this law; whether it is not evidence that he knew the law; whether he had not taken upon himself the responsibility of acting upon his own judgment, notwithstanding the law. That is for you to say.

Gentlemen, as I said before, if the counsel for the defendant have made any impression upon your minds favorable to the defendant, I, having told you what the law is, say (and I will make no comment upon the evidence which shall in any degree shake any impressions which the counsel for the defendant may have made), give him the benefit of those impressions. I will give to the defendant the full benefit of a jury trial. Let the jury be the sole judges of his guilt or innocence, without any remark of mine upon the facts of the case. But it is my duty to tell you what the law is, and I have commented upon the facts only just so far as was necessary to show and to explain to you what the law is, and to apply it to the case. My opinion is that it is not necessary for the people to show anything out of the case in order to make out corruption or bad faith. That it being the doing of an official act, without the prior performance of a jurisdictional ministerial act, the fact that the act was illegal, that the officer was prohibited from doing it, except under certain circumstances, renders him chargeable with a knowledge of that law, and that if he did the act, the doing of the act is evidence of all the intent that is necessary to be proved by the people. If he has proved anything here that in your judgment would show that he, notwithstanding the legal presumption of intention, acted honestly and did not mean to do wrong, you may take that into consideration to rebut that presumption; but in doing that you must be careful not to allow any of the facts of the case which go to make up the essence of this crime to be lost sight of. Take the case, gentlemen; look at the facts candidly, in view of what I have

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said in reference to the defendant. Give him the benefit of every doubt resting in your minds ; but at the same time that you do that, do not let your sympathies run away with your judgment, and lead you to acquit him in a case where, upon a full examination of the facts, and giving them all their true weight, he ought to be convicted, because the public have rights, and each of you are interested in the question as well as the defendant.

The counsel for the defendant excepted to that portion of the charge of the court in which it was stated that section thirty-nine of 2 *Revised Statutes* (p. 696) applied to the case of public officers. The counsel for the defendant also excepted to that portion of the above mentioned charge in which the court charged that the defendant acquired no jurisdiction of the case pending before him, on the application for bail, unless all the papers mentioned by the statute were before him.

The counsel for the defendant also excepted to that portion of the charge in which the court stated that where the performance of any act was forbidden by statute and a party does that act he is guilty of a misdemeanor.

The counsel for the defendant also excepted to that portion of the charge in which the court stated that the doing of the act stated in the indictment was sufficient proof of intention to sustain the prosecution.

The counsel for the defendant also excepted to that portion of the charge where the court stated that it was not necessary, in order to sustain the indictment, to prove corruption.

The counsel for the defendant also excepted to that portion of the charge in which the court stated that the act in question, to wit, the taking of bail without proof of service of the required notice and without the production of the required proofs, &c., was not a judicial act, and that judicial action did not in this case commence so as to shield defendant,

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without proof of corruption, till he acquired jurisdiction under the statute.

The jury found the defendant guilty. The proceedings being stayed on the conviction, on a certificate of probable cause by the city judge, a writ of *certiorari* was issued.

Henry L. Clinton, for the defendant.

I. The court erred in admitting evidence to prove that Porkousky (the bail) did not reside at 278 Houston-street; Porkousky, in his affidavit before the justice, swore that he resided at 278 Houston-street. There is no proof or pretence that Justice Bogart, at the time he took the bail, knew the fact to be otherwise.

II. The court erred in charging that the defendant acquired no jurisdiction of the case pending before him, on the application for bail, unless all the papers mentioned by the statute were before him. 1. That the defendant had jurisdiction sufficiently appears from 2 *Revised Statutes* (p. 893, § 31, *subd.* 4, 4th ed.), which reads as follows: "The police justices in the city of New-York shall respectively have power to let to bail in all cases where the judge of the Court of General Sessions in said city is authorized to let to bail." That the Court of Sessions had jurisdiction to let to bail under the circumstances which surrounded the case in question when Justice Bogart "let to bail," will not be disputed.

III. The court erred in charging "that the act in question, to wit, the taking of bail without proof of service of the required notice, and without the production of the required proofs, &c., was not a judicial act." 1. It is absurd to say that the act of a judge in deciding on the sufficiency of papers before him, in reference to the question whether a prisoner shall be let to bail, is not judicial, and that, too, even though the motion for bail ought to be denied. Surely a judicial decision is none the less judicial because it should have been rendered the other way. As well might it be said that were

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a judge of the Supreme Court to grant an order of arrest in a civil case, and yet, upon a motion for that purpose, vacate his own order of arrest on account of the insufficiency of the affidavit on which it was granted, as that the decision of the judge granting the order was ministerial, while the decision of the same judge vacating the order was judicial because the first decision was bad and the last good law. (*Horton v. Auchmoody*, 8 *Wend.*, 200-2; *Tompkins v. Sands*, *id.*, 462, 466, 469; *Harman v. Brotherson*, 1 *Denio*, 537-40; *Paine v. Barnes*, 5 *Barb. S. C. R.*, 465; *Weaver v. Dieffendorf*, 3 *Denio*, 117-19.

IV. The court erred in charging that, in order to sustain the indictment, it was not necessary to prove corruption. The gist of the offence charged in the indictment is corruption.

1. The case of the *People v. Brooks* (1 *Denio*, 457), which probably misled the learned judge below, was an indictment for neglect of duty in not performing a ministerial act, to wit, swearing a witness. The court (Beardsley, J.) expressly says: "The offence charged is not the neglect of a judicial duty, but of one purely ministerial, which the officer was absolutely bound to perform, and had no discretion or right to decline;" thus distinctly recognizing the doctrine for which I contend in the case at bar.

2. In the case of *The People v. Coon* (15 *Wend.*, 227), which was the case of a justice of the peace indicted for not taking sufficient sureties for the appearance of a person brought before him charged with a criminal offence, the court (Bronson, J.) recognized the same doctrine. The court say: "There is nothing in the objection that justices of the peace are not liable to be indicted for misbehavior in their office. Whenever they act partially or oppressively, from a malicious or corrupt motive, they may be punished criminally." On page two hundred and eighty-one, the court held the following language: "The only offence of which the justice could have been guilty was that of discharging Goff, without taking sufficient sureties or requiring bail in a sufficient sum to secure his personal

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appearance to answer any bill that might be found against him by the grand jury ; *and even such an act would not be criminal, unless it were done from a corrupt motive and with intent to pervert the course of justice.*" 3. In the case of *The People v. Norton* (7 Barb. S. C. R., 477) this doctrine is considered. The court (Willard, J.) say : "But the rule, that a judge is not indictable for an error in judgment, extended at common law only to judges in courts of record, and not to ministerial officers." But the common law has not clothed them with the same immunities as it has courts of record, except in those cases where they act purely in a judicial capacity. As they cannot be impeached for corruption, they may be indicted. In England, the proceeding against them is either by information in the King's Bench, or by indictment ; and Lord Tenterden, in *The King v. Borron*, (3 Barn. & Adolph., 452), observes, that whenever their conduct is sought to be questioned, either by information or indictment, the question has always been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded, whether from a dishonest, oppressive or corrupt motive, under which description fear and favor may generally be included, or from mistake or error. In the former case alone they have become the objects of punishment. (12 John., 356.) The same doctrine precisely is laid down in 1 *Russell on Crimes* (p. 136) ; also in 1 *Chitty's Criminal Law*, (p. 873). In *Wharton's American Criminal Law* (p. 732, 2d ed.), the following language is used : "A justice of the peace is indictable for misbehavior in his office when he acts partially, or oppressively, or from malicious or corrupt motive."

V. The Court erred in the following particulars : First. In charging that section thirty-nine applied to the case ; Second In charging that where the performance of any act is forbidden by the statute, a party who does that act is guilty of a misdemeanor ; Third. In charging that the doing of the act stated in the indictment was sufficient proof of

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intention to sustain the indictment. The language of the charge, in this particular, is as follows: "Where it (the act) is illegal, the proof of doing the act is evidence of a bad motive, and *constitutes the offence*." Fourth. In refusing to charge each of the ten propositions which the court was requested to charge *seriatim* by prisoner's counsel.

A. Oakley Hall (District Attorney), for the people.

I. The only evidence objected to is that tending to show that the surety taken by Bogart was worthless. 1. Now this was admissible as a fact growing out of the *res gesta*; a consequence of an act which the defendant did. 2. The subsequent admission covers any error which may have occurred in admitting the testimony. And see charge of the judge on this point. 3. If the bail had been very good, instead of very bad, under the law contended for by defendant before the judge below in charging the jury, his counsel would have thought it hard not to have been allowed evidence showing that the bail was good, and no injury done to the people.

II. The defendant acted without jurisdiction; he acted illegally; he acted intentionally, and, therefore, willfully; and the willful doing of the prohibited act satisfies the verdict of guilty, no matter whether the act was done honestly, or with good intentions, or was not corrupt, or is not productive of any injury; and the allegation of corruption is mere surplusage, and may be rejected. 1. All magistrates and judges who have power to let to bail are called officers. (2 *R. S.*, p. 893, § 31, 4th ed.) 2. Police justices, prior to 1833 (*Laws of 1833*, ch. 11, § 9), had limited jurisdiction as to admitting to bail. (1.) After 1833, they possessed powers equal to those of the judges of General Sessions. (2.) But they never had legal authority to bail any persons except those brought before them charged (that is, preliminarily before them as charged) with crime. (3.) The judges

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of the General Sessions could issue writs of *habeas corpus*, and thus acquire jurisdiction of the persons in order to bail them; but a police justice had no power to acquire jurisdiction over a person, except by issuing a warrant against him. The statute says, in enumerating justices, "officers before whom persons charged with crime shall be brought." 3. The statute giving the police justices power to let to bail, in all cases where a judge of the Court of General Sessions is authorized by law to let to bail, was a statute merely extending their power to certain felonies whose punishment exceeded five years. (1.) That is, they have power to bail in all cases wherein they have jurisdiction. (*Commonwealth v. Canada*, 13 *Pick.*, 88-90; *Petersdorf on Bail*, 513.) 4. But whether this be so or not, in 1846 came a statute qualifying the jurisdiction of all officers in letting to bail, which is recited in the indictment. This act is in spirit taken from divers English statutes. (*Id.*, 507.) 5. Before 1833, no police justice could bail unless the prisoner was charged with an offence whose maximum of imprisonment was five years. After 1846, no police justice (among other officers) could bail unless he were committing magistrate, or unless certain formalities had been complied with to give him jurisdiction. The law prior to 1833 has a prohibition by implication, or more properly by a negative growing out of an affirmation. That of 1846 was a positive prohibition. The concurrent statute made the doing the act thus under a prohibition a misdemeanor. It was analogous to the statute of 5th *Edward III.* (ch. 8), whereby the marshal of the Queen's Bench was prohibited from bailing persons indicted of felony on pain of half a year's imprisonment. (1.) Judge Bogart had jurisdiction of the person of William Lawson by virtue of his own warrant and commitment; but of William Lambe, who happened to be the same man, and who was committed by another magistrate, he had not, because the requisites of the statute to confer jurisdiction had not been complied with. (2.) Yet he willfully bailed without his

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jurisdiction; because the evidence shows that "he thought he had a right;" and thus acted with knowledge as to the question of power. Even if he had acted ignorantly, he would have been no better off in his legal *status*. (*The People v. Brooks*, 1 *Denio*, 457; *Dwar. on Statutes*, 677; *Saintsbury's case*, 4 *T. R.*, 457; *Yates v. Lansing*, 5 *John.*, 282; 1 *Gabb. Cr. L.*, 780; *Bacon's Abr.*, "Bail," 595; *The People v. Lohman*, 1 *Comst.*, 379; 2 *Mass.*, 120, 410.)

III. But the circumstances abundantly show malice and oppressiveness to the people, savoring of corruption. 1. The accumulation of offence by the man bailed. 2. The aliases of the man bailed. 3. The employment of one not a clerk to aid the magistrate. 4. The undue haste used. 5. The suspicious character of the bail offered. 6. Making the bail on the second charge less than that upon the first; and reducing the bail from \$1000 to \$500 on his own commitment. 7. The prisoner was a notorious pickpocket.

IV. The charges requested from the court were either not warranted by the evidence, or were redundant, and were, therefore, properly ignored. (*Carpenter v. Stillwell*, 1 *Kern.*, 79; *City of New-York v. Price*, 5 *Sandf. S. C. R.*, 542.) 1. Catechising the judge is disfavored. (*Bulkeley v. Keteltas*, 4 *Sandf. S. C. R.*, 455.)

By the Court, ROOSEVELT, J.—The defendant Bogart was indicted by the grand jury for a misdemeanor in violating his duty as a police justice, by unlawfully letting a prisoner to bail without authority, and without notice to the district attorney. The surety, it appears (one Joseph Porkousky), turned out to be "not what he represented himself;" and when his presence was needed, the usual case of what is denominated straw bail, neither he nor his principal was to be found. On the trial of the justice, which took place in February last, before the Court of Sessions, for the alleged misdemeanor, the jury, after a short consultation, under the charge of the city judge, returned a verdict of guilty. Sundry

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exceptions were taken to the charge; and on these exceptions the case is now brought before the general term of the Supreme Court for review.

The principal point made by the defendant's counsel on the argument was, that the court below erred in charging the jury that in order to sustain the indictment it was not necessary to prove corruption. We think the court were right. No such proof is required. The law says (2 R. S., 696, § 39), that "where the performance of any act is prohibited, &c., the doing such act shall be deemed a misdemeanor." It does not say the doing such act corruptly, but the doing it shall constitute the offence. Every citizen, and especially every police justice, is presumed, in such cases, to know the law, and when he does an act which the law prohibits he is presumed to intend to do it, and, as a consequence, to intend to break the law. The allegation, therefore, in the indictment, that the defendant "did willfully, maliciously, unlawfully and corruptly do an act prohibited by law," is a mere legal conclusion. They are formal words, inserted more to give solemnity to the instrument than for any other purpose.

That Justice Bogart was not the committing magistrate, in the complaint of Miller against Lawson, appears from the recognizance taken by him. He, of course, knew that he was not. The warrant for that offence was before him, signed, not by him, but by the recorder. He knew, he certainly was bound to know, that the statute (*Laws of 1846*, 408) expressly declared that "no officer other than the committing magistrate should let to bail any person charged with a criminal offence, unless notice of the application to bail such person shall have been given to the district attorney." He knew that Nambe, *alias* Lambe, *alias* Lawson, the alleged thief, was not only charged but indicted. All this appeared in Recorder Smith's commitment, and in the recognizance signed by himself. He knew, also, that the district attorney was not apprised of the intended application. In bailing

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the prisoner, under these circumstances, he could not help knowing that he was doing an act which the law expressly prohibited his doing. He was acting, therefore, intentionally, willfully, or, in legal parlance, "corruptly." The expressions as thus used, not an uncommon occurrence in legal documents, are synonymous. They have the same meaning as in a plea of usury alleging that the party "willfully and corruptly" exacted more than seven per cent. The offence imputed to the officer was the doing of an unlawful act knowingly. In such case, as the judge below expressed it, "the proof of doing the act is evidence of a bad motive, and constitutes the offence." It may be that the party accused would have the right to rebut the inference. The defendant has not done so. He has not attempted to do so. The judge, moreover, instructed the jury that, "If there was any evidence tending to prove that fact (namely, a misconception of the full force of the statute), with the view to rebut the presumption of bad intention arising from the doing of the act," they might, "under all the circumstances, take it into consideration." He further expressly charged the jury, "That if the defendant had proved anything which in their judgment would show that, notwithstanding the legal presumption of intention, he acted honestly and did not mean to do wrong, they should take that into consideration to rebut the presumption." It seems to me this was all the court could be asked to say; and the verdict, therefore, under such a charge, must be understood as a finding by the jury that the wrong done was not the result of honest mistake. To call such an act judicial, and therefore, like other judicial errors, exempt from indictment, would be to repeal the statute: I mean the statute which prohibits magistrates from thus, *ex parte*, interfering with, and, in effect, nullifying each other's commitments. With such a construction, error of judgment would be the universal plea, and acquittal the universal result.

Judgment affirmed.

SUPREME COURT. Cayuga General Term, June, 1856. *T. R. Strong, Welles and Smith, Justices.*

FRANCIS HAYEN, plaintiff in error, *v.* THE PEOPLE, defendants in error.

The Revised Statutes have abolished all assignments of error, and allegations of diminution, or writs of error and *certiorari*, in criminal cases.

In deciding a criminal case, therefore, brought up on a writ of error, the Supreme Court cannot look beyond the record of judgment.

To enable a party to avail himself of any irregularities in the court below, it should be presented in the first instance, in that court, either by plea in abatement, or bill of exceptions, so as to introduce it upon the record, and thus subject it to review upon writ of error after judgment.

THIS was a writ of error to the court of Sessions of Livingston County. The plaintiff in error was indicted in the Sessions in March 1854, for arson of a barn, in the night time. He was tried upon the indictment in the same court in September following, when he was convicted, and adjudged to be imprisoned in the State prison at Auburn for the term of seven years and six months. The writ of error commanded the court below to send the record of the judgment with all things concerning the same.

The return to the writ contained a transcript of the record of conviction, and the judgment of the court thereon. The record was in the usual and proper form, in all respects, of a judgment record of conviction in a criminal case.

Upon the coming in of the said writ, the plaintiff in error filed a special assignment of errors alleging diminution in the record and praying a writ of *certiorari* to bring up the matters alleged in diminution. But no such writ was issued.

The assignment of errors, and allegations of diminution were in the following form :

And the said Francis Hayen, by Charles C. Willson his attorney and counsel, comes into court and says, that in the record and proceedings aforesaid, and also in giving judgment

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aforesaid, there is manifest error in this, to wit: That the record contains no indictment; that the paper purporting to be an indictment, (or copy thereof), was never presented to any court of criminal jurisdiction, nor was it ever presented by any grand jury of the said county of Livingston. There is error also in this, to wit: that at the time said pretended indictment purports to have been found, presented and filed, there was no Court of General Sessions, regularly organized, sitting in said county of Livingston, nor were the persons by whom the same purports to have been found and presented, a grand jury of the said county of Livingston. There is error in this also, to wit: that the orders made by the county judge of the said county of Livingston convening the said court at which said pretended indictment purports to have been found and presented, and appointing the same, was not entered in, and contained no reference to said Court of Sessions, but was defective in this behalf and was altogether null and void, which order, is entered of record in the minutes of the clerk of said court but is omitted in the answer and return of the said Court of Sessions to the writ of error. There is also error in this, to wit: There is no order of the county judge of Livingston county convening said Court of Sessions, at which said pretended indictment purports to have been found and presented, and that the order under which said court convened, appoints only a county court. There is also error in this, to wit: that the return of the sheriff to the precept directed to him, commanding him to summon the grand jurors to attend said term at which said pretended indictment purports to have been found and presented, is imperfect, insufficient and altogether null and void, which return, together with such precept is on file in the office of the clerk of said county, but is omitted in the return and answer of the said Court of Sessions to the writ of error. There is also error in this, to wit: that the said court erred in refusing to grant the motion of the defendant for his discharge made to the said court after the verdict rendered and

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before judgment, and upon proof by affidavit that there never had been in this case any legal or valid, or any indictment presented or filed against him, the said Francis Hayen therein, for the crime of arson, which papers are on file in the office of the clerk of said court, at his office in Geneseo, but was omitted in the return and answer of the said Court of Sessions to the writ of error. And the said Francis Hayen prays a writ of the people of the State of New-York to be directed to said Court of Sessions to certify to the said justices of the Supreme Court, the truth of the same, and it is granted to him. And the said Francis Hayen prays that the judgment aforesaid, for the errors aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled and altogether held for nothing; and that he may be restored to all things which he hath lost by occasion of the said judgment.

The defendants pleaded, *in nullo est erratum*.

Charles C. Willson, for the plaintiff in error.

James Wood (District Attorney), for defendants in error.

By the Court, WELLES, J.—Before proceeding to the consideration of the sufficiency of the matters alleged in diminution, as presenting errors for which the judgment of the court below should be reversed, it is proper to dispose of the question of practice as to the effect of the plea of the defendants in error in the case before us.

There is, no doubt, as a general rule, that in civil cases, the plea *in nullo est erratum* admits the facts stated in an assignment of errors of fact, which facts are outside the record. (*Graham's Pr.*, 789, 1st ed.; 957, 2d ed., and authorities there cited.)

It is contended, however, by the counsel for the defendants in error, that such admission extends only to such facts as, if specifically denied, would be triable by a jury; such, for

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example, as infancy of the party, &c., and not to such matters as are brought up in answer to a writ issued to certify diminution, which are tried by inspection without a jury. But I apprehend that such a plea is an admission of every fact properly alleged which is not shown by the judgment record as brought up by the writ of error, without regard to the manner of trial, whether by the court or a jury. Such seems to have been the ruling in *Pelletreau v. Jackson* (7 Wend., 478), where Savage, Ch. J., after examining the question quite fully, and reviewing the authorities, comes to the following conclusion: "The practice, then, as I understand it, is this: upon the return of the writ of error, if the plaintiff wishes to avail himself of any error not contained in the record, but the evidence of which appears upon the files or records of the court to which the writ of error was directed, he may assign errors generally, and also specially, by a separate pleading, and in such special assignment allege diminution; and upon filing an affidavit of the service of a copy of such allegation of diminution, he may enter a rule of course awarding a *certiorari*, which *certiorari* he may cause to be returned within the rule to plead. This he is not obliged to do unless compelled by a rule taken by the defendant. If the defendant pleads, *in nullo est erratum*, he admits the facts stated in the allegation of diminution, but not that they are cause of error. If he does not choose to make that admission he must rule the plaintiff to return the *certiorari*. If such rule is not obeyed, the plaintiff will be *non-prossed*. If a return be made to the *certiorari*, the defendant may plead such plea as he shall be advised by his counsel."

There is an expression of Cowen, J., in *Hill v. Stocking* (6 Hill, 277), which favors the idea that the plea in question only admits facts triable by a jury. But the case did not necessarily involve the point, and the question does not appear to have been much considered. There is no reason why the admission should extend to one case more than the

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other. In both, evidence in support of the allegations is equally necessary, while in the case of error apparent upon the record, no further evidence is necessary.

Generally, no assignment of errors or joinder in error in criminal cases is necessary. (2 R. S., 741, § 22.) The section referred to is in the article entitled "Of writs of error on judgments and certioraris in criminal cases," and is in the words following: "No assignment of errors or joinder in error shall be necessary upon any writ of error or *certiorari*, issued pursuant to the foregoing provisions; but the court shall proceed on the return thereto, and render judgment on the return before them." If this statute is to be construed as excluding assignments of errors, in all cases of writs of error in criminal cases, it is equivalent to a prohibition upon the court against their looking beyond or behind the record of judgment; for that is all the writ of error brings up. If this be so, it must be because for every error and irregularity in the court to which the writ of error is directed, not apparent on the face of the record, some other adequate remedy is provided, and which, if the party avails himself of, at the proper time and in the proper manner, he will be secured a fair trial according to the forms prescribed by law.

I am constrained to the conclusion that the section recited is imperative, and in effect abolishes all assignments of error and allegations of diminution on writs of error and *certiorari* in criminal cases. The language is too explicit, it seems to me, to admit of a different construction. It is that the court shall proceed on the return to the writ and render judgment on the return before them. This will not deprive a party accused of any legal right, or foreclose him against interposing any legal objection, whether technical or meritorious. It only requires him to insist upon his rights, and make his objections in an orderly manner, and at the proper time. Where they relate to matters extrinsic of the judgment record, his remedy is by motion, as in case of irregularity

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of the jury on the trial. In most cases before conviction, they could be presented either by plea in abatement or bill of exceptions, either of which would introduce them upon the record, and thus subject them to review upon writ of error after judgment. In the case of *The People v. Monaghan* (1 *Park. Cr. R.*, 570), the principal question now sought to be presented was properly raised and decided upon a demurrer to a plea in abatement. Any of the matters contained in the allegation of diminution in this case, if good at all, would be so by way of plea in abatement.

In *The People v. Griffin* (2 *Barb. S. C. R.*, 427) we held that it was too late to take an objection upon the trial relating to the organization of the grand jury. I see no difference in principle between that case, in respect to the question under consideration, and the present. The objections here relate entirely to the regularity and validity of the grand jury. No complaint is made touching the legality or jurisdiction of the court at which the plaintiff in error was tried, or of any error committed on the trial. It is not that he has not been fairly tried or justly convicted, but is simply that he was tried upon an indictment not legally presented. After he has appeared upon the indictment at a term of the court regularly and legally constituted, and demanded a trial upon his plea of not guilty, has been tried and convicted and judgment passed against him, his objections to the inceptive proceedings come too late, and are not before us at a time or in a form of proceeding to justify this court in entertaining them.

If these views are correct the judgment of the court below should be affirmed.

Judgment affirmed.

SUPREME COURT. New-York Special Term, June, 1856. *S. B. Strong*, Justice.

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A *certiorari*, to remove an indictment from the Oyer and Terminer to the Supreme Court, before trial, may be issued on the application of the prosecution.

And where a cause so removed is pending in the Supreme Court, and it appears that a fair, impartial and effectual trial cannot be had in the county in which the indictment was found, the Supreme Court, at special term, will order the trial to be had in some other county.

Where the indictment is against several persons, and enough is shown on the part of the prosecution to make a change of the place of trial proper as to one defendant, the change will be made as to all the defendants, although it is a case in which every defendant is entitled to a separate trial.

And where it appears, in opposition to such application, that the defendants' witnesses are poor and unable to bear the expenses of a journey to another county, and that the defendants also are destitute of property, the court may require, as a condition to changing the place of trial, that the district attorney procure some arrangement to be made by which the county, in which the indictment was found, shall pay the necessary expenses of the indigent witnesses subpoenaed in behalf of the defendants and attending at any court in which the trial shall not be postponed at their instance.

Ordinarily, where the place of trial is changed in a criminal case, an adjoining county should be selected; but if the necessity which requires the change calls for it, a more remote county may be designated.

THE defendants were indicted, in the New-York Oyer and Terminer, for the murder of William Poole. After a trial in which the jury did not agree, the cause was removed by *certiorari* into the Supreme Court. A motion was now made, in behalf of the prosecution, to change the place of trial from New-York to Suffolk or some other county, on the ground that a fair and impartial trial could not be had in the city and county of New-York. The counsel for the defendants moved to quash the *certiorari*, on the ground that it could not legally be sued out by the prosecution. By consent, both motions were heard together. The motion to change the place of trial was founded on the following papers :

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City and County of New-York, ss :

Stephen B. Cushing, being duly sworn, deposes and says : That as Attorney General of this state he attended upon the trial of Lewis Baker, indicted for murder, in the Court of Oyer and Terminer, in the city of New-York, for the term of April, 1856. That the indictment was called on for trial by the people on the second Monday of April, and the proceedings in respect to a trial commenced by calling and challenging and swearing jurors. That the first panel of five hundred jurors (after excuses to the commissioner of jurors and to the court were given, and after absentees had been fined) had remaining upon it about one hundred jurors who answered ; that of this number five jurors in chief were obtained ; two were challenged peremptorily by the prisoner's counsel, and one was set aside by triers upon a challenge to the favor by the people. That a new panel of five hundred jurors was then ordered and served after some days delay ; of the jurors named upon which two hundred or thereabouts answered, and seven jurors in chief were obtained who were impartial, one of whom was excused by the court because of religious objections to sitting as a juror upon Saturday, his Sabbath. That this additional number of jurors was exhausted, and one more juror became necessary ; whereupon an additional number of two hundred and fifty jurors were summoned, about seventy-five of whom were first examined before the twelfth juror was obtained as being impartial. That of all the challenges only three were peremptory ; the great majority of them being for principal cause, and being found true by the court. That this deponent doubted the legal propriety and expediency also of exhausting one panel of jurors, in a capital case, and then adjourning the trial to obtain other jurors ; but yielded his doubts to the extreme anxiety of the prisoner's counsel to obtain a jury in the county of New-York.

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From the experiences of this attempt to obtain a jury in the city of New-York, in regard to the difficulties in procuring individuals unbiassed and not impressed by newspaper reports, to act as jurors, and in regard to the delays and irregularities necessarily attending prolonged examinations and challenges of jurors, deponent is constrained to the opinion that whilst the obtaining of an impartial jury in the city of New-York, upon another trial of the indictment against Lewis Baker may be possible, it is improbable, and certainly attended with delays and irregularities which would be prejudicial to the interests of the people prosecuting the said indictment.

Deponent joins in the motion of the district attorney to change the venue of the said trial.

STEPHEN B. CUSHING.

Sworn before me, this 1st }
day of May, 1856. }

HENRY VANDERVOORT, *Clerk of Sessions, &c.*

City and County of New-York, ss:

A. Oakley Hall, being duly sworn, deposes and says: That he was present in behalf of the prosecution, spoken of in the foregoing affidavit of Mr. Cushing, during the whole of the proceedings, in respect to the trial above alluded to; that he kept a tally of jurors answering, and of the respective challenges, and from his said tally he finds the result in terms as set forth in the foregoing affidavit.

Deponent further says: That the trial first had upon the indictment against Lewis Baker occupied more than a week, and that the evidence and speeches of counsel were stenographically reported for and published in all the city newspapers, and to deponent's belief were very extensively read in this city; that the merits and demerits of the said trial were very extensively discussed in public and in private, and the editorial comments in the newspapers, both for and

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against the prisoner, were frequent and pointed in their expressions.

That, in the opinion of this deponent, a jury which is at once impartial and intelligent cannot be obtained in the county of New-York.

A. OAKLEY HALL.

Sworn this 5th day of May, }
1856, before me. }

HENRY VANDERVOORT, *Clerk of Sessions, &c.*

City and County of New-York:

I, Henry Vandervoort, Clerk of the Court of Oyer and Terminer in and for the city and county of New-York, at the request of the district attorney, do certify: That at the April term, 1856, of the Court of Oyer and Terminer, twelve hundred and fifty jurors were summoned for the purpose of trying an indictment against Lewis Baker for the murder of William Poole; about four hundred appeared; two hundred and twenty-two were set aside on challenge, having formed or expressed an opinion as to the guilt or innocence of the prisoner; three were peremptorily challenged by the prisoner, after passing the ordeal of principal challenge and challenge for favor; twelve jurors were sworn in chief; the remaining jurors were discharged, or excused by the court for various reasons, or were not drawn, there remaining in the ballot-box, on the completion of the jury, about twenty ballots.

Given under my hand, and attested by the Seal of the
[L. S.] said Court, this seventh day of May, in the year
one thousand, eight hundred and fifty-six.

HENRY VANDERVOORT.

James T. Brady, Horace F. Clark, Daniel E. Sickles and Abraham D. Russell, for the defendants.

A. Oakley Hall (District Attorney) and Stephen B. Cushing (Attorney-General) for the people.

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The points of the argument sufficiently appear in the opinion of the court.

S. B. STRONG, J. The defendants stand indicted for the alleged murder of William Poole, in the city and county of New-York. The indictment contains as many counts as there are defendants respectively, charging each as primary, and the others as secondary principals.

The first count charges the defendant Baker as the most prominent actor, and the others as being present at the scene of the murder and aiding and abetting him. He elected to be tried separately. He was first tried at a court of Oyer and Terminer, held before Judge Roosevelt in the county of New-York (where the venue is laid and the indictment was found), in December last. The trial lasted nearly a fortnight, and resulted in the disagreement of the jurors and their discharge.

His trial was again commenced at a Court of Oyer and Terminer held before me, pursuant to an appointment by the chief judge of the Court of Appeals, in the same county, on the fourteenth of April last. Five hundred jurors had been summoned to attend the trial. Of that number five only were sworn, the others having failed to attend, or having been excused or rejected on challenges for cause, or on peremptory challenges in behalf of the defendant. Another panel of five hundred jurors was then ordered, and they were summoned to attend on the twenty-fourth of April; on that and the next days seven of the last panel were procured, who, from their answers, appeared to be free from any legal exceptions. One of them was excused from serving as he was conscientiously opposed to attending to any secular business on the Jewish sabbath, and it was conceded that the trial would extend beyond one such day. The other six were sworn, when that panel was exhausted. Another two hundred and fifty was then ordered for the twenty-ninth of April. On the last mentioned

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day the twelfth juror was obtained, there remaining in the box, when his name was drawn, about twenty undrawn ballots. The impanneling of the jury occupied nearly four days. About four hundred persons appeared; of those two hundred and twenty-two were set aside on challenge for having formed and expressed an opinion as to the guilt or innocence of the accused on trial, three were peremptorily challenged by him, twelve were sworn as before stated, and the remaining jurors were excused or eventually discharged. The trial proceeded a short time, during which two witnesses were examined on the twenty-ninth of April. On the next day one of the jurors sworn failed to attend, and it appeared, on an examination of a messenger from him, that he was confined to his bed, and probably would remain so for a considerable period, by indisposition. The counsel for Baker thereupon proposed that the trial should proceed before the eleven jurors who were then present, or that the Jew who had been excused should sit on the trial and thus complete the number, or that those who remained of the last panel should be resummoned, and that the person whose name should be first drawn should be sworn and act as the twelfth juror. These propositions were declined by the counsel for the people, and the eleven jurors were thereupon discharged.

The court then adjourned to the first Tuesday in June, and a panel of one thousand jurors was ordered. Subsequently to the last mentioned adjournment, a *certiorari* was issued by the District Attorney and allowed by Judge Roosevelt, removing the action into the Supreme Court. On the twenty-fourth of May, two motions were made at a special term, held before me, in New-York, pursuant to an appointment made by the chief judge of the Court of Appeals, and also at the request of the justices of the first judicial district, who were otherwise engaged,—one by the counsel for the prisoners, that the *certiorari* should be quashed as having been improvidently issued, and the other by the counsel for

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the people, that the place of trial should be changed to some other county, on the ground that a fair and impartial trial of the action could not be had in the city and county of New-York.

The prisoners' counsel contended, in support of their motion, that a *certiorari* to remove an indictment from the Oyer and Terminer to the Supreme Court cannot lawfully issue at the instance of the counsel for the prosecution. There can be no doubt but that it has always been competent for the counsel for the crown in England, and since our revolution for the counsel for the people in this state, unless the power has been abrogated by the statutory provisions which I shall presently consider, to remove criminal actions from the Oyer and Terminer to a higher tribunal by *certiorari*. Mr. Chitty, in his valuable work on criminal law (1 *Chitty's Cr. L.*, 377), after citing several acts of parliament restricting or regulating the practice upon *certiorari* in criminal cases, says: "But these acts apply only to writs of *certiorari* on the part of the defendants, and therefore *the crown and a private prosecutor may still obtain them*, without affidavit or recognizance, unless expressly prohibited by particular statute," and he cites 5 *Durnf. & East*, 626; 6 *id.*, 194; 3 *Bosanquet & Puller*, 354; 2 *Strange*, 900-1209; *Coup.*, 18; 1 *East*, 305; 15 *id.*, 327; *Bacon's Abr.*, tit. "*Certiorari*," C. And again the same author remarks (p. 378), the writ of *certiorari* is demandable of absolute right only by the king himself, and to him the court is bound to grant it. The English reports are full of cases where *certioraris* to remove criminal actions from the Oyer and Terminer to the Court of King's Bench (which, as to its jurisdiction in criminal cases, corresponds to the Supreme Court in this state) have been issued on the application of the officers of the crown. The case in 3 *Bosanquet & Puller* (p. 354), cited by Mr. Chitty, was before the House of Lords, and it was decided by that tribunal that the *certiorari* could be issued by the officers of the crown, notwithstanding general restrictive words in an

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act of parliament in reference to the class of cases to which the decision referred. The right of the prosecution to issue this process is impliedly recognized in this state in the provision of the Revised Statutes (2 R. S., 733) that "all issues of fact joined upon any indictment shall be tried by a jury in the county where such indictment was found, unless for special causes the Supreme Court shall order an indictment removed into that court to be tried in some other county." This speaks of the removal of criminal causes as an existing common law practice, and makes no attempt to restrict it.

There are several cases in our reports which sustain the right to obtain this process in behalf of the people. In the case of *The People v. Vermilyea and others* (7 Cow., 141), where one of the indictments had been removed to the Supreme Court by *certiorari*, the District Attorney inquired whether he should give the other indictments the same direction by issuing writs of *certiorari* for their removal to that court: to which Chief Justice Savage answered: "You must take your own course on that subject. *You have a right to remove the other causes*, or to try them where you are, as you shall think advisable." In the case of *The People v. Webb* (1 Hill, 179), where the defendant had been indicted for a libel on J. Fennimore Cooper, in the county of Otsego, the indictment was removed by *certiorari*, on the application of the District Attorney, from the Oyer and Terminer to the Supreme Court, and the place of trial was changed to the county of Montgomery. In that case the *certiorari* to the Oyer and Terminer had been obtained after that court had ordered that the trial should proceed, or that a *nolle prosequi* should be entered. It is true, as was said by the counsel for Baker on his argument, that the right to issue the writ in behalf of the prosecution was not disputed in that case; but the motion to change the place of trial, which followed it, was warmly contested, and if it had been supposed that the process had been irregularly obtained, the

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objection, which would have been fatal to the motion, would have been urged. The silence of the counsel and of the court was, under the circumstances, significant against the objection.

The counsel for the defendants contended that if the right to issue the *certiorari* in criminal cases, by the District Attorney, had existed at common law, it would have been abrogated by sections one and two of chapter sixty-five of the acts of 1829, and the first section of chapter twelve of the act of 1847. The act of 1829 provides (§ 1), that no *certiorari* to remove into the Supreme Court any indictment pending in a court of oyer and terminer, before trial thereon, shall be effectual, unless allowed by a justice of the Supreme Court, or (then) circuit judge; and (§ 2) that before allowing any such writ, the officer to whom application should be made should take from the defendant a recognizance with sureties, conditioned that the defendant prosecuting such writ will appear at the return day thereof in the Supreme Court, and abide the orders and rules of such court; and the first section of the act of 1847 merely exempts the defendants who may be indicted for treason, murder or arson in the first degree, and who may be in custody, from the necessity of entering into any recognizance for their appearance in the Supreme Court. If the first section of the act of 1829 had stood alone, as that merely regulated the practice, and did not purport to take away any right, it might have been construed to include *certioraris* issued in behalf of the people. But the second section, although it specifies the process in general terms, evidently refers to such as might be allowed in behalf of the defendants. The prosecution could not be required to give a recognizance for the conduct of the defendant as a condition for obtaining the writ. There is no statutory provision involving such an absurdity, except in the eighth section of the act for the prevention of intemperance, pauperism and crime (*Laws of 1855*, 346, 347), which provides that an appeal and the service of a

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notice thereof shall be of no effect in behalf of the defendant or complainant, unless he shall deliver to the magistrate an undertaking to the people in the sum of \$500, with one or more sureties, conditioned, among other things, that the defendant shall not, during the pendency of the appeal, violate any of the provisions of the act; thus requiring the complainant, where the appeal is by him, to become responsible for the good behavior of his opponent! But the prohibitory act furnishes no very reliable rule for the construction of other statutes. In reference to the act of 1829, it may raise a slight inference that the Legislature by which it was passed supposed that the *certiorari* could be issued only at the instance of the defendant. But that could not have the effect to abrogate a preëxisting right of the people, and one, too, which might be so very essential to the due administration of justice under circumstances of frequent occurrence. In England it has been clearly settled that the rights of the crown are not taken away by any general statutory provision, unless the intention to do so is clearly and directly manifested. Thus, in the case of *The King v. Davis* (5 Term R., 626), Judge Buller remarked that "the general rule is, that when the *certiorari* (in criminal cases) is taken away by act of parliament, the crown is not included in the restriction, unless there be some words in the act to show that the legislature intended it;" and Judge Grose said: "We cannot break in upon the general rule which has been so long established, that the crown is not bound by the general words of a statute taking away the *certiorari*, unless it appear upon the face of the act of parliament that the legislature intended that the crown should be bound." The same principle was sustained and applied to a *certiorari* in a criminal case obtained by the crown officers in the case of *The King v. The Inhabitants of the County of Cumberland* by the Court of King's Bench (6 Term R., 194) and by the House of Lords (3 Bosanquet & Puller R., 354). There are many other cases in the English reports to the same effect,

and the rule is well settled in the country from which we inherit the common law. In this state, where the people have acquired the rights originally appertaining to the crown of England in criminal cases, except where they are inconsistent with our form of government, or have been expressly abrogated (and neither is the case here), it is safe to conclude that the well settled rights of the public have not been taken away by a remote inference. The continuance of the right in question was recognized by the Supreme Court in the case of *The People v. Webb* (which I have before cited), long after the passage of the act of 1829. I am satisfied that it still exists, and the motion to quash the *certiorari* in this case is therefore denied. The indictment may nevertheless be hereafter remanded to the Court of Oyer and Terminer for trial, should the ends of justice require that procedure. (2 R. S., 742, § 28.)

The most material and by far the most difficult question presented for my consideration is, whether the place of trial should be changed on the ground that a fair and impartial trial cannot be had in the city and county of New-York. There are many palpable reasons why trials in criminal cases should ordinarily be had in the counties where the transactions which gave rise to them occurred, and a change should not be made except for forcible and clearly established causes. Our statutes require that issues of fact joined upon any indictment shall be tried by a jury in the county where such indictment was found, unless, for special causes, the Supreme Court shall order an indictment removed into that court to be tried in some other county. (2 R. S., 733, § 1.) Mr. Chitty says (*vol.* 1, 495) that "not very strong evidence of partiality will be required in order to induce the court to listen to the application for the removal" (to another place of trial). To that I cannot consent, nor is the position supported by the authorities to which the learned author refers. In one of the cases cited by him (*Rex v. Harris*, 3 *Burrows*, 1, 333), Lord Mansfield said: "There

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must be a clear and solid foundation for the suggestion" (of partiality). The question as to the unfairness or partiality of a drawn juror, does not refer exclusively to his feelings, but extends to any opinion which he may have formed and expressed in reference to any material question involved in the controversy, and which may at all influence his decision. Thus, one who acted as grand juror when the indictment was found, or who (in a case involving the life of the accused) cannot, from conscientious scruples, render a verdict which would lead to the punishment of death, is disqualified, although he has no hostile or favorable feeling toward the defendant. Some of the English authorities seem to indicate that some feeling of the juror, either hostile or friendly, must be involved in the objection to render it effectual; but it has been otherwise adjudicated in this state. In the case of *The People v. Vermilyea*, the English and American authorities were elaborately reviewed by Judge Woodworth; and he expressed an opinion, in which the other judges concurred, that a challenge, because the juror has expressed an opinion, is for principal cause, and need not be accompanied by personal ill-will to render it valid. (1 Cow., 108.) A juror should have the ability, and one who is conscientious would feel the inclination, to decide all questions of fact submitted to him, solely from a fair and impartial view of the evidence, without being at all influenced by ulterior considerations; but that would be difficult, if not impossible, where he had previously formed and expressed a strong opinion upon the matter, especially if it corresponded with the public sentiment. Let him exert himself as he may, he cannot wholly avoid the difficulty. He will, in a case where the testimony is contradictory, yield a more ready credence, and give greater weight to that which sustains, than that which opposes his preconception: such is the infirmity of the human mind, and we must take it as we find it. When the opinions extend so far as to become the general sentiment in the community where a trial of an exciting case

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is had, it forms a serious obstacle to the due administration of justice, and the evil should be arrested when that is possible. In the case under consideration there were many circumstances calculated to attract attention, and to induce the formation and expression of opinion, especially in a community proverbially excitable. Of these, some of the more prominent were the public character of the deceased, and of some of those who were present at the time when he received his death wound, and who have been charged with a participation in the tragedy; the singular prolongation of the life of the wounded man with a ball in his heart; the immense funeral procession which accompanied and followed the body to the grave; the flight of one of the persons charged with the homicide across the ocean; the pursuit and capture of the fugitive under circumstances which induced the strong condemnation of his eloquent counsel on the argument before me; his subsequent protracted trial, and the publication in the newspapers of the city of the testimony, which was taken with great minuteness, of the eloquent speeches of the counsel, and of the elaborate and able charge of the presiding judge. It is not at all remarkable that these circumstances should have led to the formation and expression of opinions by the citizens of New-York, especially those who witnessed any of the exciting scenes, or who read the newspapers. That there is a strong and all but universal sentiment in the city as to the truth or falsity of the charge, as it respects the defendant, Baker, was apparent from the statements of the jurors who appeared before me. Of the two hundred and thirty-eight who were examined, all but sixteen had both formed and expressed opinions as to the alleged guilt of the prisoner, and still retained them. The number of those who passed the ordeal of a strict examination was so inconsiderable that they could not be deemed a fair representation of the intelligence and reliability of the class which comprises the jurors of the county. The jurors who were admitted may all have been respectable men. I have

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no personal acquaintance with either of them, and heard nothing against any of them, except some insinuations by the District Attorney on the argument, which, as they were not supported by any evidence, cannot be regarded in the decision of the motion which is now under consideration. If, however, they were all reliable men, such a consummation was, under the circumstances, so remarkable that a similar result on any future attempt could not be reasonably anticipated. When so few out of so large a number of jurors are at all admissible, the right to challenge twenty peremptorily, which our laws benignly secure to persons tried for capital offences, gives to the defendants almost the entire control in the selection of the jury. In cases where all or the greater portion of those summoned are unexceptionable, the full exercise of this privilege cannot operate prejudicially; but it is quite apparent that where but an inconsiderable number is admissible it may create a very great embarrassment, and seriously obstruct the course of justice. In this case, when the trial was before me, but three jurors were challenged peremptorily. Ordinarily that might raise an inference that the admitted jurors were peculiarly acceptable to the defendant. How it was in this instance I am unable to say. Baker swears that he was unacquainted with any of the jurors and had no influence over them. However, I am bound to consider the possible and (generally) probable effect of the existence and exertion of the privilege. If the trial of this action should proceed in New-York, it would probably be necessary, as it was before, to summon more than one panel. Where so many are to be selected and summoned, a considerable number of days must necessarily intervene. During that time, the jurors already sworn must (at least under our practice) be permitted to separate and to mingle with their fellow citizens, without any restriction. The injunction, to hold no conversation with others on the subject of the trial, may be obeyed by conscientious men; but it sometimes happens that one is sworn as a juror

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who is not a conscientious man, and as to such there can be no security. Besides, there is no responsibility upon the outsiders, and the inconsiderate will express their opinions and argue to support them in the hearing of the sworn jurors. The danger of improper influences from such causes is very considerable. I am aware that some similar difficulty may occur if jurors are permitted to separate during the trial; and it was for this reason that when I proposed to introduce the practice in trials for murder in the city of New-York, several years ago, I was warned by the judges of that district that it would be a dangerous precedent. But it seemed to me then, and I still think, that scarcely any state of circumstances will justify the seclusion and confinement of the jurors, and particularly of the infirm, and of those extensively engaged in business, during a protracted trial, from the time when they are sworn until they render their verdict. The practice of thus confining them would operate very injuriously to the administration of justice, as the more reliable men would refuse to sit at all on trials for murder. The separation during the trial is so evidently just that the danger resulting from it is a matter approaching very near to a necessity; but a state of circumstances which would increase the risk should if possible be avoided. In this case, if a judgment is to be formed from the past, and it must be, it will be difficult to procure any jury, and still more so to obtain one by which a fair, impartial and effectual trial can be had in the county of New-York. Although a sufficient number of qualified jurors might possibly be found of those who might not have formed or expressed any opinion as to the guilt or innocence of the accused, yet the strong existing public sentiment must be known to them, and it will have its influence. The jurors may be charged to disregard it, but they cannot do that with all their efforts. During an experience of many years I do not remember a verdict in a criminal case, in opposition to a strong public sentiment previously entertained and generally known. If that should

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be erroneous, and it sometimes is, it will probably lead to an unjust verdict. If there should be a divided sentiment, it would result in a disagreement, and the trial thus prove abortive. Whether the inability of the jury first impaneled in this action to agree upon a verdict resulted from the effect of public opinion upon the minds of some of the number cannot be certainly known. Perhaps it may be, under the circumstances, the inferable cause; but I do not place any reliance upon that. There is sufficient without it to warrant the conclusion which I have adopted, that a fair, impartial and effectual trial of this action cannot be had in New-York, and that therefore it should take place in some other county.

The counsel for the defendant McLaughlin contended that the action should not be sent into another county for trial, as, if it should take that direction as to one, it must as to all, and nothing appeared to prove that his client could not have a fair trial in the county of New-York. It is undoubtedly true that, as to the question whether McLaughlin participated in the transaction at all, or in any manner which would make him responsible, there is no evidence that any opinions have been formed or expressed. But then when one is charged as an active participator, an opinion as to the guilt or innocence of one of the actors, and especially when all were together, must have an important bearing as to all, and it would disqualify a proposed juror who had entertained and expressed it on the trial of either of the defendants. Sergeant Hawkins says, in his work on the *Pleas of the Crown* (ch. 43, § 27), that "the exception to an indictor is good upon the trial of another indictment, or action wherein the same matter is either in question or happens to be material, though not directly in issue." The principle that an opinion as to the guilt of an associate, would exclude a juror, was sustained by the Supreme Court in the case of *The People v. Vermilyea and others*. There might and would, therefore, be a difficulty in obtaining a

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fair and unprejudiced jury in New-York to try either of the defendants.

It seems, from the affidavit of Baker, that he has a large number of witnesses who are poor and unable to bear the expenses of a journey to another and perhaps distant county, and that he is also destitute of property, and his counsel made a feeling appeal to me against changing the place of trial, and thereby in effect depriving him of the ability to establish his defence. This objection, if well founded, would be entitled to great consideration. The defendants should not be deprived of any legitimate means of defence, nor will I consent to do that. They must, at all events, have a fair trial. I shall, therefore, from a sense of justice evidently as to Baker, and probably as to the other defendants, require that the district attorney shall make a satisfactory arrangement for the payment, by the county of New-York, of the necessary expenses of the indigent witnesses subpoenaed by or on behalf of the defendants, or either of them, and attending at any court where the trial shall not be postponed at their instance. Under such an arrangement, it seems to me that a change of the place of trial cannot be productive of injustice. It is undoubtedly true that it is often advantageous to the innocent accused that the trial should be where they and the witnesses are known, and where the circumstances can be appreciated from local knowledge, but it is still more important that their fate should be decided by jurors selected from an unbiassed community. It can scarcely be necessary for me to say that I do not intend to impeach, in the slightest degree, the general character of New-York jurors. Their respectability and their disposition to do right are not doubted; but they, like those selected from the rural districts, may be influenced, in weighing the evidence and adopting their conclusions, by the public sentiment, when that has been strongly formed and become generally known.

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Ordinarily, where the place of trial is changed, an adjoining county should be selected, and so the authorities declare.

However, there is no express limitation, and if the necessity which may require any change, should call for a more remote county, that should be selected. In this case, it is probable that the constant intercourse between the inhabitants of New-York and the adjoining counties, and the free circulation of the newspapers of the city in its vicinity, have effected an extensive coincidence of sentiment, and the embarrassment in obtaining a fair and impartial trial in any adjoining county would be very great; I must therefore direct that the trial shall be had in a more remote county. The notice of motion designates the county of Suffolk, and as no particular objection was raised to that locality, I shall direct that the trial be had there, unless the counsel for the prosecution and for the defendants shall sign a mutual consent designating some other county.

An order must be entered, reciting that it satisfactorily appears, from the disagreement of the jury first empaneled to try the defendant Baker, the prevalence of formed and expressed opinions among the many jurors who had been summoned, and had attended upon the inchoate second trial of the same defendant, and the indications which were thereby evinced that a strong sentiment as to the guilt or innocence of the defendant existed very generally among the citizens of New-York, that a fair and impartial trial of the accused cannot be had in the county of New-York, where the venue is laid, and that, therefore, the trial must be had in the county of Suffolk (or any other county which may be designated by counsel), upon the completion of the arrangements which I have designated for the payment of the expenses of the defendant's witnesses.

WESTCHESTER OYER AND TERMINER. June, 1856. Before *S. B. Strong*, Justice of the Supreme Court, *W. H. Robertson*, County Judge, and the Justices of the Sessions.

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The trial of a criminal case will be postponed on the application of the defendant, on the general affidavit of the absence of material witnesses, unless it is apparent that the application is made merely for the purpose of delay; in which case an affidavit will be required showing the nature of the defence intended to be sustained by the absent witnesses, that the court may judge of their materiality.

Where an application was made to postpone the trial of an indictment for murder, and it was claimed by the District Attorney, and was not controverted by the defence, that no living person except the prisoner was present at the alleged murder, and there was no pretence of an *alibi*, such general affidavit was held to be insufficient, and the prisoner was required to disclose what defence he expected to establish by the evidence of the absent witnesses.

Trials in criminal cases will not usually be postponed on account of the absence of witnesses to character.

Where an application was made to postpone the trial of an indictment for murder, to enable the defendant to procure witnesses to character, and the District Attorney, in opposing the motion, offered to admit the previously good general character of the prisoner, the motion was denied on the making of such admission.

On the trial of an indictment for murder, a juror was challenged by the District Attorney, for principal cause, on the allegation that he was opposed to capital punishments; on being sworn, the juror testified that he was opposed to the punishment of death, but said that if sworn as a juror on a trial for murder, and the evidence of guilt was clear, he should find the accused guilty; held, that the challenge was not sustained.

Where a challenge for principal cause, in such a case, had been made and tried, and the juror had been decided to be competent, it was held that the trial of the challenge might be opened, even after the juror had been sworn and taken his seat, and other jurors had been called, but before evidence in the cause had been taken, if it appeared that the juror had misunderstood the question put to him, and had given a wrong answer, and that the juror desired to make the correction and to say that he could not, under any circumstances, convict on a charge of murder; and where, on resuming the trial of a challenge under such circumstances, the juror repeated such correction, the challenge was held well taken, and the juror was set aside.

On a trial before the Oyer and Terminer, in the county of Westchester, it appeared that the alleged murder had been perpetrated on board a vessel

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lying at anchor on Long Island Sound, about a quarter of a mile west of Hartt Island, and northerly of a line connecting the extreme points of Hartt and City Island; held, that the offence was committed within the county of Westchester.

Every part of the State of New-York is included within some one of the counties enumerated in the statute.

Where a body of water, in which the tide ebbs and flows, is situated between a range of islands and the main shore, and all are so near to each other that a person with the ordinary power of vision can see with the naked eye, from point to point, on every part of the connecting line, what is doing on each, it is within the county bounded upon the high seas, according to the rule which extends the jurisdiction of a county to a line running from one to the other of the *fauces terre*.

When a brother-in-law of the deceased was called to show that, five months after the alleged murder, he saw and examined a body which was found, and was claimed to be the body of the deceased, and proceeded to testify to several points of resemblance between the body found and the person charged to have been murdered, and was then asked by the counsel for the prosecution, whether, in his opinion, it was the body of the person alleged to have been murdered, it was held, that the question was incompetent, and that it was the province of the jury, and not of the witness, to draw the conclusion from the points of resemblance, and to decide upon the identity of the body found, it appearing that the body found had been much decomposed and changed, and that all the remaining points of resemblance had been stated by the witness to the jury.

Ordinarily, there can be no conviction for murder until the body of the deceased is discovered; held, that the circumstances of this case formed no exception to the rule.

E. Wells (District Attorney), for the people.

B. Bailey and *F. Larkin*, for the prisoner.

On the 10th of June, 1856, two indictments were found and presented against the prisoner, one charging him with the murder of William Palmer, captain of a schooner called the *Eudora*, on board of that vessel, while lying at anchor between Hartt Island and City Island, in that part of Long Island Sound bordering on the county of Westchester, on the 24th of November, 1855; and the other charging him with the murder of Gilbert Pratt, the mate of that vessel, at the same time. The prisoner, on being arraigned, pleaded not

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guilty, and demanded a trial. The District Attorney proposed to try the prisoner, upon the indictment for the murder of Captain Palmer, on some day during the then session of the court. Mr. Bailey, for the prisoner, presented his affidavit, stating that he had material and necessary witnesses in the city of New-York, and others in the State of Pennsylvania, whose attendance could not be procured during the present session of the court, and moved that his trial should be postponed until the next session of the court, in the following September. The District Attorney opposed the motion, stating that the alleged crime had been perpetrated by the prisoner (who was the colored cook on board the vessel), during the night, when none but himself and the two murdered men were present, and that the absent witnesses could have no knowledge of the transaction.

STRONG, J. It is usual to put off trials in criminal cases on the general affidavit, unless it is apparent that the application for postponement is merely for the purpose of delay; then, and especially in cases where (as in trials for murder) the ends of justice are best attained by prompt action, something more is required. The affidavit should then state the nature of the defence to be sustained by the absent witnesses, in order that the court may judge of their materiality. In this case it seems, or at least it is inferable from the statement of the District Attorney, which is not controverted, that no living person but the prisoner was present (if indeed he was the guilty party) at the scene of the alleged murders. If so, the proposed witnesses can say nothing as to the transaction, and there is no pretence of an *alibi*. It is, therefore, so difficult to conjecture what material facts those witnesses can disclose that it is reasonable and proper to refuse a postponement, unless the prisoner discloses the nature of the defence which he intends to establish by their evidence.

Mr. Bailey then said that it was intended to prove by the absent witnesses that the prisoner had, up to the time of the supposed murder, sustained a fair character. The District

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Attorney proposed to admit, for the purposes of the trial, that the prisoner's general character had been good.

STRONG, J. Trials in criminal cases are not usually put off on account of the absence of witnesses to character. If that could be done there would be few, if any, trials for murder at the same court where the indictments are found, as the accused may suppose, or at least they could easily swear, that there were absent witnesses who could attest to their general good conduct. Besides, although the dread of perjury would be great with the innocent, yet, there would be little or none with those guilty of a more heinous offence. It is said by Chitty, and, I think, also in an opinion in the Court of King's Bench [the judge alluded to what was said by Laurence, J., in the case of *The King v. Jones*, 8 East, 31], that it is the constant practice of the Old Bailey not to put off trials on account of the absence of witnesses to character, lest there should be a failure in that prompt execution of justice so necessary to the intimidation of offenders. (1 *Chit. Cr. L.*, 402.) If, however, an admission from the public prosecutor had been necessary, it should, to make it of any avail, be unqualified.

The District Attorney made such admission.

STRONG, J. The trial must, then, be set down for the twelfth instant.

On that day the trial commenced. After several of the jurors drawn had been challenged and set aside, and one had been sworn, one Ezra Haight was called, and was challenged for principal cause by the District Attorney, on the allegation that he was opposed to capital punishments, and could not, therefore, conscientiously convict any one on a charge of murder. The juror, on being sworn, testified that he was opposed to the punishment of death; but said, in answer to a question from the court, that he should, if sworn as a juror on a trial for murder, and the evidence of guilt was

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clear, find the accused guilty. The court thereupon decided that the challenge had not been sustained, and the juror was thereupon sworn and took his seat. After another juror had been sworn, and several others had been set aside, Haight, who had been laboring under considerable trepidation, addressed the court, and said that he had misunderstood the question propounded to him, and given a wrong answer, and that he desired to correct himself, and say that he could not, under any circumstances, convict one on a charge for murder. The District Attorney thereupon moved that the juror should be set aside, which was opposed by the counsel for the prisoner, who said that in a case of so much importance they were bound to raise every objection which could benefit the accused.

STRONG, J. The position is a novel one, but it does not, I think, present an insurmountable difficulty. It was correctly held, in the case of *The People v. Damon* (13 Wend., 351), that a juror, who, after he is sworn in chief and has taken his seat, is deemed to be incompetent to serve, may in the exercise of a sound discretion be set aside by the court at any time before evidence is given, and that this may be done even in a capital case, and as well for cause existing before as after the juror was sworn. In that case, however, the juror had not been previously challenged; whereas in that now before us a challenge had been interposed, and a trial has been had, and the juror has been found by the court to be competent. So long as that finding stands, the juror cannot be discharged; and yet it would be a mere mockery of justice to suffer the trial to proceed under such circumstances, and with such a juror. The maxim that "what necessity compels, it justifies," must, I think, apply in such a novel case. Our decision that the juror was competent must be vacated; the challenge to him must be opened; and the trial of it must be resumed. This was done; the juror repeated his last statement, and the

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court pronounced the challenge true, and the juror was set aside.

The District Attorney stated in his opening address to the jury that the murder had been perpetrated on board of the *Eudora*, whilst she was lying at anchor about a quarter of a mile west of Hartt Island, and within (northward of) a line connecting the extreme points of Hartt and City Islands.

The counsel for the prisoner objected that, from the statement of the District Attorney, it was apparent that the scene of the alleged murder was upon Long Island Sound, and therefore beyond the jurisdiction of a state court sitting in the county of Westchester.

STRONG, J. The boundary line of the State of New-York commences at Lyons Point, at the mouth of Byram's river, where it falls into Long Island Sound, and the last portion of it runs from Sandy Hook to the place of beginning (Lyons Point) in such manner as to include Staten Island and the islands of Meadon on the west side thereof, Shooters Island, Long Island, Gardiners Island, Fishers Island, Shelter Island, Plumb Island, Robins Islands, Ram Island, the Gull Islands and all the islands and waters of the Bay of New-York and within the described bounds. (1 R. S., 61-65.) Whether a line is drawn directly from Sandy Hook to Lyons Point, or (what the description requires) a circuitous line, so as to include the islands, is adopted, that part of the sound where the vessel was lying is within this state. By a statutory provision the state is divided into fifty-six counties. (3 R. S., 1.) By this I understand the entire state, so that every part of it, whether of land or water, is included in some county; such appears to have been the opinion of our Court of Appeals in a case reported by Mr. Selden. [The judge alluded to the case of *Manley v. The People*, 3 Seld., 295.] In that case a majority of the judges, upon that principle, decided that where goods had been stolen on board of a

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vessel in Long Island Sound, opposite the county of Suffolk, but *extra fauces terræ*, the offence was committed within that county. The dissenting judge admitted that a careful examination will show that every part of the state is included in some one of the counties enumerated in the statute, but he contended that no part of Long Island Sound, "except so much of it as Westchester includes," is embraced in either. The county of Westchester is bounded southerly by Long Island Sound, and includes "all the islands in the sound to the east of Frogs Neck and the northward of the main channel," of which Hartt and City Islands are two. As those islands are confessedly north of a straight line from Sandy Hook to Lyons Point and also of the main channel, they, and I think as clearly the waters between them, are in the county of Westchester. Besides, where, as in this case, a body of water in which the tide ebbs and flows is situated between a range of islands and the main shore, and all are so near to each other that a person with the ordinary power of vision can see with the naked eye from point to point on every part of the connecting line what is doing on each, I think that it is included within the county according to the *rationale* of the rule which extends the jurisdiction of the county to a line running from one to the other of the *fauces terræ*. I am satisfied that this court has the requisite jurisdiction, so are all of us, and the trial must proceed.

Neither of the bodies were found until the following May. Some time in that month a body was cast on the shore of Hunter's Island, within two miles of the place where the Eudora was anchored at the time of the alleged murder, during a severe storm, which was supposed to be that of Captain Palmer. The body was considerably decomposed, but there were several very significant marks upon it, among others, there was a considerable excoriation around one of the legs, which appeared to have been made by a tight ligature, which had probably been severed by sharp

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stones. The length of the body was within half an inch of the height of the deceased. In both the body of the living Captain Palmer and that which was found there was an unusual length of the face from the ear to the chin; a considerable widening of the end of the little finger of the same hand, and a ridge from the root to the end of the nail. The captain had impressed the initials of his name, with indelible ink, on his arm and his leg. The skin on the same part of the same arm of the body found had been cut out, and a part of the skin on the marked leg had also been removed, but the letter "P" had been left and was plainly visible. A brother-in-law of the captain, who saw and examined the body thrown on Hunter's Island, was examined as a witness, and, after he had mentioned these various marks, he was asked by the counsel for the prosecution whether, in his opinion, it was the body of the deceased captain. The counsel for the prisoner objected to the question.

STRONG, J. Ordinarily, the question of identity is one of fact, and a witness may be asked whether he knows a particular individual, and, if so, whether he is the person indicated; but the question put to this witness is not the ordinary one of identity. It calls for an opinion relative to a body which, if that of the deceased, had been submerged in salt water for upwards of five months, and had undergone many changes. The witness can only state a conclusion drawn from the points of resemblance mentioned by him. The jury have heard his statements, and it is for them, and not the witness, to decide whether the body was that of the deceased captain.

The question must be rejected.

The vessel had been sunk shortly after the supposed murder. Four holes had been bored through her bow, and the auger was inside of the vessel and near the holes. The pillows and mattresses of the captain and mate were satu-

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rated with blood; many of their clothes had been thrust into a hole under the cabin. The prisoner had an axe which corresponded in shape and size with a cut in the skull of the body found on Hunter's Island. There was no evidence that any other person than the prisoner was on board of the vessel with the captain and mate on the evening of the murder. The prisoner left the vessel in a sinking condition, about eight o'clock on the following evening, in a long boat, and was arrested when near the shore of City Island. On stripping him, the captors found the captain's pocket-book, containing about \$50, in one of the prisoner's boots, and they also found upon his person the mate's watch and pencil case, and some other articles of the deceased persons. The prisoner said that they had gone ashore the day before, but gave no other account of what had occurred on board the vessel.

In the several opinions expressed by the presiding justice the other members of the court concurred.

STRONG, J., in his charge to the jury, after recapitulating the evidence, and stating several rules of law applicable to the case, said that ordinarily there could be no conviction for murder until the body of the deceased was discovered. That there were several exceptions to the rule, however, as where the murder has been on the high seas at a great distance from the shore, and the body had been thrown overboard, or where the body had been entirely consumed by fire, or so far that it was impossible to identify it. But in the present case, the scene of the supposed tragedy was near the shore, and there was strong reason to suppose that, if a murder had been committed, the body of the deceased would be discovered. The exception to the rule is therefore inapplicable, and the jury must be satisfied that the body discovered on Hunters Island was that of the murdered captain, before they could convict the prisoner.

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The trial was concluded at one o'clock in the morning of the fourteenth of June, at which hour the jury found the prisoner guilty. He was sentenced to be hung on the twenty-sixth of July following, and was accordingly executed on that day.

SUPREME COURT. Delaware General Term, July, 1856. *Gray, Shankland and Mason, Justices.*

RICHARD THOMPSON, plaintiff in error, v. THE PEOPLE, defendants in error.

In charging, in an indictment, a statutory offence, it is not necessary to follow the precise language of the statute, but words of equivalent import are sufficient.

An indictment for burglary in the second degree, charging the felonious breaking and entering of the "house" of E. B. P., with intent, &c., was adjudged sufficient, on writ of error, it being held that the word "house," in its primary and common acceptation, meant a "dwelling-house."

After conviction and sentence, it is too late to question the indictment, if it contain the substance of the offence, so that the defendant have intelligible notice of the charge made against him.

Where the return to a writ of error contained only the indictment and the clerk's minutes of the trial, showing the empanneling of the jury, the verdict of guilty and the sentence of the court, without any judgment record, it was held that the questions could not be raised, whether the defendant was present at the trial, or whether he was asked previous to the passing of the sentence if he had anything to say why sentence should not be pronounced against him.

Whether such objections would have been available if the record had been before the court, *quere*.

THIS was a writ of error to the Chenango Oyer and Terminer, where the prisoner was convicted of burglary in the second degree. The facts are sufficiently stated in the opinion of the court.

Horace Packer, for the plaintiff in error.

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I. The indictment is not good on its face. It does not state facts to constitute the crime. The word "house" is too general, and is not within the statute. Our statute (2 R. S., 669) is the same as the English 7th and 8th George IV., ch. 29. (1 *Arch. Cr. Pl.*, 225.) The offence must be laid as committed in a "dwelling-house." (4 *Bl. Com.*, 225; *Russ. on Cr.*, 797, 819, 820, 826; 1 *Hale*, 550; *Bac. Abr.*, tit. "*Burglary*," E.; *Chit. Cr. Law*, 1109; *Barb. Cr. Law*, 96; *Roscoe's Cr. Ev.*, 349; *Fost. Cr. Law*, 38, 39.) Many of our own courts have had the principle involved in this question before them, and have uniformly held with the English authorities. (*Wild's case*, 2 *Metc.*, 408; 3 *Serg. & Rawle*, 199; 16 *Mass.*, 141; 2 *Mason*, 140.)

II. The indictment should charge that the house was a dwelling, and that some person resided or dwelt in it. (*Forsyth v. Commonwealth*, 6 *Ham. Ohio*, 22.) In *Lewis' case* (16 *Conn.*, 32), the words "in the night season," were omitted, and after verdict of guilty and judgment, error was brought, and judgment reversed. The Supreme Court of Virginia, in error, held a like defect fatal in *Mark's case* (4 *Leigh*, 658). Our late Court of Errors, in *Lambert's case* (9 *Cow.*, 578), say: "Every indictment must contain a certain description of the crime, and a statement of the facts by which it is constituted." The Supreme Court, in *Allen's case* (5 *Denio*, 76), held the same, and say that where the statute defines an offence, the indictors must allege the facts to bring it within that definition. Our statute (2 R. S., 668, 669) defines burglary, "The breaking into and entering in the night-time the dwelling-house of another, in which there shall be at the time some human being, with intent," &c., either, &c., specifying the modes, means, manner and circumstances, all of which are wanting in this indictment to make it burglary in the second degree. In this degree it must be a dwelling-house. Burglary cannot be committed in any other house or building, unless it be joined or attached to the dwelling and under its protection, and then

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it must be laid as committed in the dwelling-house, and the circumstances must be stated. This might have been a wood-house, or hen-house, or carriage-house, or cheese-house, &c. Webster defines a dwelling-house to be a house in which one lives. He defines a "house" to be a building intended or used as a habitation. It may be of man or beast; it may be a college, a temple, monastery, the manner of living, the table, a family of ancestors, a tribe, the quorum of a legislative body, the grave, the body, the residence of the soul in this world, or domestic concerns; a residence is about the last definition Webster gives to house. "The indictment must be certain to every intent, and without any intendment to the contrary." (1 *Chitty on Cr. Law*, 171, 172; *Cro. Eliz.*, 490; *Cro. Jac.*, 20; *Stark. Cr. Pl.*, 203; *id.*, 214.) "No latitude of intention can be allowed to include anything more than is expressed." (2 *Burr.*, 1127; 2 *M. & S.*, 381; 1 *Chitty Cr. Law*, 172.) "Every crime must appear on the face of the record with a scrupulous certainty." (1 *Chitty Cr. Law*, 172; *Call.*, 187; 1 *Chitty Cr. Law*, 226, 227; *Arch. Cr. Pl.*, 40, 41; *Lambert's case*, 9 *Cow.*, 578.) The breaking and entering in the night-time "a house not occupied as a dwelling-house," and committing a larceny therein, constitutes only a larceny. (2 *Metc.*, 408.) Here the intent to steal only is charged, and it is made burglary in the second degree. These defects vitiate the indictment. (1 *Chitty Cr. Law*, 226, 227; *Arch. Cr. Pl.*, 38); and the defendant may take advantage of them by writ of error. (*Arch. Cr. Pl.*, 38, 39; 5 *East*, 304; 2 *Hill*, 248; 2 *R. S.*, 740; and cases above cited.) The defendant below does not appear to have been present to object to the defects.

III. The record and judgment are bad on error. 1. It does not appear that the defendant was present at the trial, or when sentence was pronounced. 2. The record and proceedings should show upon their face that the court had jurisdiction of the person as well as of the subject matter. This defect would be fatal on error even in a civil action.

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3. It does not appear that the clerk or court asked the defendant what he had to say (if present) why sentence should not be pronounced against him; and this is error. (*The People v. Clark*, 1 *Park. Cr. R.*, 360, and cases there cited; *Safford v. The People*, *id.*, 474, and cases there cited.) These two cases were brought up on error and judgments reversed. 4. The record cannot now be amended. (*Miller v. Finkle*, 1 *Park. Cr. R.*, 374.) 5. The judgment should be reversed, and the defendant therein discharged. (*Taylor v. The People*, 3 *Denio*, 97, and cases there cited.)

Isaac S. Newton (District Attorney), for the people.

I. The offence is sufficiently described in the indictment to sustain the conviction. 1. The word house will be deemed to mean a dwelling-house, according to its common intent and use, and especially so in this case, after trial, proof of breaking a dwelling-house in the night-time given without objection, and conviction and judgment thereon.

The word house means, "*appropriately, a building or edifice for the habitation of man; a dwelling place, mansion or abode for any of the human species.*" (*Webster.*) And "every house for the dwelling and habitation of man is taken to be a mansion house in which burglary may be committed." (3 *Inst.*, 64; *Arch. Cr. Pl.*, 330, note I., 6th ed.) It has always been and is sufficient to use the word mansion, instead of dwelling-house. (*Barb. Cr. L.*, 103; *Bacon's Abr.*, tit. "*Burglary*," E.; 4 *Black. Com.*, 224; *The Commonwealth v. Pennock*, 3 *Serg. & Rawle*, 199.) This is because the mansion is, by common acceptance, a place of residence. By parity of reasoning, the word house with us is sufficient, as in common use it has the same meaning. Under the statute the indictment is good. It will be seen that it describes a dwelling-house within the definition found in 2 *Revised Statutes* (657, § 9; *id.*, 844, 4th ed.), and 2 *Revised Statutes* (669, § 16; *id.*, 854, 4th ed.) The same term, dwelling-house,

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is used in the statute for the crime of arson in the first degree. Under that it is held that "'House,' merely, without saying 'dwelling-house,' will suffice." (*Barb. Cr. L.*, 69, 2d ed.)

II. This objection comes too late. It is in principle, if valid at all as an objection, precisely like the case of *The People v. Powers* (2 *Seld.*, 50). The defect complained of is, in fact, and under the decisions, matter of form merely. It did not and does not tend to prejudice him. It is such a case as is provided for by 2 *Revised Statutes* (728, § 52). That statute provides that "No indictment shall be deemed invalid, nor shall the trial, judgment or other proceedings thereon be affected, by reason of any defect or imperfection in matters of form which shall not tend to the prejudice of the defendant." It has been decided, under this statute, that an indictment is good if it contain the substance of the offence, so that the defendant shall have intelligible notice of the charge against him; that defects are settled by judgment. (*The People v. Powers*, 2 *Seld.*, 50; *The People v. Biggs*, 8 *Barb.*, 547; *The People v. Treadway*, 3 *Barb.*, 470; *The People v. Phelps*, 5 *Wend.*, 10; *The People v. Rynders*, 12 *Wend.*, 431, 432; *The People v. Warner*, 5 *id.*, 271; *The People v. Taylor*, 3 *Denio*, 91; *Butler v. The People*, 4 *id.*, 68, 71.) The strictness with which indictments were formerly construed has been greatly relaxed. (*The People v. Lohman*, 2 *Barb.*, 216, and also cases cited above.)

III. The indictment is good at common law, as well as under the statute. At common law the burglary must take place in a mansion or dwelling-house in the night-time. (*Butler v. The People*, 4 *Denio*, 70; *Arch. Cr. Pl.*, 330, note 1, 6th ed.) But it is sufficient to state the substance of any offence at common law, and the substance is here stated, and it is good, especially after verdict. (4 *Bl. Com.*, 224; see definitions in point I., above.) The authority of 1 *Hale* (p. 550), it is submitted, was never good, and has not been followed in adjudged cases, though quoted by some authors. (2 *Bouv.*

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Bacon's Abr., 135, *tit.* "Burglary," *E.*) It is there said, in speaking of this question, that "*Andr.*, 302, and *S. P. C.*, mention precedents of indictments of burglary IN DOMO, without adding MANSIONALI. Also, it is agreed, that burglary may be committed in breaking churches, or the walls or gates of a walled town, in which the word *mansionalis* cannot be made use of." This state has never held the position of Hale good, and since the statute above quoted, and the decisions under it, there can be no doubt of the correctness of the judgment in this case.

MASON, J. The defendant was indicted under the twelfth section of article two, part four, chapter one of the Revised Statutes, which enacts that "every person who shall be convicted of breaking into any dwelling-house in the night-time, with intent to commit a crime, but under such circumstances as shall not constitute the offence of burglary in the first degree, shall be deemed guilty of burglary in the second degree." (2 R. S., 668, § 12.) There is but one count in the indictment in this case, which charges "that Richard Thompson, late of the town of Oxford, in the county of Chenango aforesaid, on the fifteenth day of October, one thousand eight hundred and fifty-four, with force and arms, about the hour of twelve o'clock in the night of the same day, at the village of Oxford, in the county aforesaid, the house of Eleanor B. Padgett, there situate, feloniously did break and enter, with intent, the goods and chattels and property of the said Eleanor B. Padgett, in the said house then and there being, then and there feloniously and burglariously to steal, take and carry away the goods, chattels and property of the said Eleanor B. Padgett, in the said house then and there being, to the great damage, &c., and against the form of the statute," &c.

The defendant was tried in the Oyer and Terminer, and was convicted of burglary in the second degree. No question was raised upon the trial as to the sufficiency of the

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indictment, or for any defect therein. The defendant was sentenced to imprisonment in the state prison for five years. No motion, in arrest of judgment or otherwise, was made in the court below. No bill of exceptions has been made, but the defendant has procured a writ of error, and has caused the indictment to be certified to this court, with the clerk's minutes of the trial, showing the empanneling of the jury, the verdict of guilty, and the sentence of the court. There is no record returned by the clerk. The defendant now asks a reversal of the judgment, on the ground that the indictment does not charge a criminal offence; that it is defective in omitting the word "dwelling" before "house;" that the words "dwelling-house" must be used in charging the offence of burglary under the statute.

It is not necessary to follow the precise language of the statute in charging the offence in the indictment. Using words of equivalent import to those in the statute is sufficient. (*Whart. Am. Cr. L.*, 133, 137; *Rex v. Fuller*, 1 *B. & P.*, 180.) The indictment in the case at bar charges a criminal offence under this statute, and the offence is sufficiently described to sustain the conviction. It has always been held sufficient to use the word "mansion," instead of "dwelling-house," in charging the offence. (*Barb. Cr. L.*, 103; *Bac. Abr.*, tit. "*Burglary*," letter "*E*;" 3 *Serg. & Rawle*, 199; 2 *Arch. Pl.*, 330, note, 1st ed.) This is because the word "mansion" means a dwelling-house or place of residence. The word "house," with us, is sufficient, for the same reason; because, in common parlance, it has the same signification. The word "house" means "a building or edifice for the habitation of man; a dwelling place, mansion or abode for any of the human species." (*Webster*.) It does not mean a wood-house, hen-house, ash-house, hog-house, corn-house, warehouse, &c. It means, in its primary and common acceptation, an edifice for the habitation of man, a dwelling place or abode for the human species, a dwelling-house. It is sufficient if the indictment contain enough to inform the defendant and the

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court of the precise nature of the charge. (*The People v. Rynders*, 12 *Wend.*, 431.) The statute in regard to arson in the first degree uses the same term, "dwelling-house," and under that statute it is held sufficient to describe the building in the indictment "the house of A. B.," without saying "dwelling-house." (*Barb. Cr. L.*, 55, 1st ed.; *id.*, 69, 2d ed.; 1 *Hall*, 567.) But again, the objection now made to this indictment comes too late to avail the prisoner after conviction and sentence. (2 *Seld.*, 50, 52; 2 *R. S.*, 728, § 52.) The indictment is good if it contain the substance of the offence, so that the defendant have intelligible notice of the charge against him. All defects beyond this are settled by the verdict and judgment. (2 *Seld.*, 50; 3 *Barb.*, 470; 8 *id.*, 547; 5 *Wend.*, 10-12, 271; 12 *id.*, 431, 432; 3 *Denio*, 91; 4 *id.*, 68, 71.)

The counsel for the prisoner claims the reversal of the judgment in this case, on the ground that it does not appear that the defendant was present at the trial or when sentence was pronounced, and that it does not appear that the clerk or the court asked the defendant what he had to say why sentence should not be pronounced against him; relying upon the cases of *The People v. Clarke* (1 *Park. Cr. R.*, 360) and *Sanford v. The People* (*id.*, 474). There are two answers to these objections. In the first place, there is no record brought up by this writ of error, and nothing like it. There is nothing before us on which error can be assigned, except the indictment, and I do not think that we should ever pass upon that, disconnected from a record showing a trial and judgment; and so we held at the last term, in the case of *The People v. Griswold*. In the case of *The People v. Gray* (25 *Wend.*, 467), the court say the record of judgment has not been brought up, and objections to errors in form, that might be corrected in making it up, cannot be entertained; and I very much doubt whether it is an error for which the judgment should be reversed, if it appear from the record that the prisoner was not asked if he had anything to

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say before sentence. It is not necessary, however, to decide this question, as we have no record here on which such error can be alleged.

I see no reason to interfere with the conviction and sentence in this case.

GRAY, J., concurred, and SHANKLAND, J., dissented.

Judgment affirmed.

SUPREME COURT. At Chambers, Kings, August 16, 1856. Before
Birdseye, Justice.

THE PEOPLE v. PETER W. ROFF.

The board of health of the town of Castleton, in the county of Richmond, has no power to make a regulation prohibiting all persons from passing from within the quarantine inclosure, situated in that town, into any other part of the town. Such a regulation is in conflict with the powers conferred by the state on the officers of the quarantine establishment: and where a person had been arrested and committed, charged with a misdemeanor for violating such a regulation, he was discharged on *habeas corpus*. The powers of a board of health organized under chapter 824 of the Laws of 1850, considered and explained.

On the 16th of August, 1856, on the petition of Peter W. Roff, alleging that he was then illegally restrained of his liberty, and imprisoned in the common jail of Richmond county, a writ of *habeas corpus* to the keeper of the jail was allowed, returnable on the eighteenth. The writ was then returned, and the prisoner brought up. The return showed that he was imprisoned by virtue of a commitment by Theodore Frean, one of the justices of the peace of Richmond county, dated on the fourteenth of August, of which commitment a copy was annexed to the writ and return.

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The commitment recites that Roff had been that day brought before the justice, charged, on the oath of John B. Giles, who made complaint, before said justice, in the words and figures following, to wit: "That on or about the 7th day of August, 1856, the supervisor and justices of the peace of the town of Castleton, in said county, were duly organized as a board of health, in and for said town, pursuant to statute in such case made and provided; that on the seventh day of August instant, the said board duly met in said town, and made certain regulations to regulate, prohibit and prevent communication and intercourse with a certain place in said town, in which there were persons who had been exposed to infectious and contagious disease, to wit, with a certain place commonly known as the quarantine inclosure; that among said regulations was one prohibiting all persons passing from within the said quarantine inclosure into any other part of said town, which said regulations were then and there duly published, pursuant to statute; that afterward, to wit, on the 14th day of August, 1856, one Peter Roff did, at the town and county aforesaid, knowingly and willfully violate the aforesaid regulations of said board of health, so published as aforesaid, by willfully passing from within the said quarantine inclosure into another part of said town, to wit, into the village of Tompkinsville; and, after examination had, in due form of law, touching the said charge and accusation, the said justice did adjudge and determine that the said offence had been committed, and that there was probable cause to believe the said Peter Roff to be guilty thereof."

The commitment, after further reciting that the said Peter Roff had not offered sufficient bail for his appearance to answer the said charge at the next court having criminal jurisdiction, commands the keeper of the jail to receive Roff into custody in the jail, and detain him till discharged according to law.

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It appearing from this return that the party was detained upon a criminal accusation, notice was given, by order, to the District Attorney of Richmond county, as required by 2 *Revised Statutes* (p. 569, § 47), as amended by *Laws of 1837* (ch. 240, § 2), and the hearing was adjourned till he should attend. The case was then elaborately argued on both sides.

E. W. Stoughton, for the prisoner.

Lott C. Clark, for the people.

BIRDSEYE, J. The thirty-eighth and thirty-ninth sections of the *habeas corpus* act (2 R. S., 567), make it my duty to "proceed to examine into the facts contained in the return, and into the cause of the confinement of" the prisoner; and "if no legal cause be shown for such imprisonment or restraint, or for the continuation thereof," to discharge him from custody.

The prisoner has not denied any fact set forth in the jailor's return, or alleged any fact to show that his imprisonment is unlawful, or that he is entitled to his discharge, as he might do by section forty-eight of the statute. But he contends that the commitment set forth in the jailor's return does not show that any crime had been committed, for the reason that the regulation of the board of health of Castleton, set out therein, is illegal and void, as contravening the policy of the law and the provisions of the statute in reference to the quarantine establishment of the state. If this be so, there is "no legal cause shown for such imprisonment," and the prisoner is by law entitled to his discharge.

By the *Laws of 1850* (ch. 324, p. 691, § 2), it is enacted that "the supervisor and justices of the peace, or the major part of them, of each town in this state, shall be a board of health for such town for each year, whenever, in the opinion of a majority of such board, the public good requires it."

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The third section of the act prescribes the powers and duties of the board of health thus constituted. That these are very broad and comprehensive will appear from an examination of the several subdivisions of this section, the third and fourth of which are these :

“3. To make regulations, in their discretion, concerning the place and mode of quarantine; the examination and purification of vessels, boats and other crafts not under quarantine; the treatment of vessels, articles or persons thereof; the regulation of intercourse with infected places; the apprehension, separation and treatment of emigrants and other persons who shall have been exposed to any infectious or contagious disease; the suppression and removal of nuisances; and all such other regulations as they shall think necessary and proper for the preservation of the public health.

“4. To regulate and prohibit or prevent all communication or intercourse by and with all houses, tenements and places, and the persons occupying the same, in which there shall be any person who shall have been exposed to any infectious or contagious disease.”

By section four of the same act, every person who shall willfully violate any regulation so made and published by any such board of health is declared guilty of a misdemeanor, and, on conviction, is made subject to fine or imprisonment, or both, at the discretion of the court, the fine not to exceed \$1000, nor the imprisonment two years.

If the board of health of Castleton had the power to make the regulation in question, then the prisoner is clearly enough charged with a crime, and is liable, on conviction, to punishment more severe than many persons suffer on conviction for felonies.

The real question presented for my decision, therefore, is, whether the board of health of the town of Castleton had,

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under the statutes above cited, the power to make a regulation prohibiting all persons from passing from within the quarantine inclosure into any other part of said town.

It is deeply to be regretted that any such collision should have arisen between this board of health, thus temporarily organized, and the officers whom the state has appointed to take charge of its quarantine establishment. It is the duty of those officers, and the state has given them sufficient powers, to protect the health of the town of Castleton, and the other towns in Richmond county, as well as of the cities bordering on the waters and rivers of the port of New-York. On the due performance of these duties, and the efficient exercise of these powers, may depend the health and lives of vast numbers, not merely in all these towns and cities, but throughout the whole state, and it may be the whole country. While the inhabitants of each town are justly entitled to exercise every lawful power for their own protection, and will be sustained by this court to that extent, it is not less my duty to see that they do not overstep that just limit, and, under the influence of perhaps a natural alarm at the approach of infection and disease, seek their own safety at the expense of the health of the community at large.

Such a conflict has never before disturbed our peace. If the rights and powers of the parties to the present dispute be clearly defined by the law, harmony will be restored, and, it is to be hoped, the wise and beneficent purposes of our health laws permanently secured.

But it is not merely the powers of the board of health thus organized in Castleton, with reference to the quarantine establishment of the state, that renders this case one of importance. If this regulation is valid, every other town in the state may pass a like ordinance. It may prohibit the entrance into any part of the town, not merely of persons from the quarantine establishment of the state, in charge of its health officer, and the other functionaries whom the state has appointed to assist him, but of persons from any other

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town in the state, even though the board of health of such town may not think that any disease exists within it, or may decide that every case of disease has been cured. What the town of Castleton here assumes to do, towards that institution of the state, may be done towards the same town by every other town in Richmond county, or in Kings, or in any portion of the state.

So far as I discover, by a hasty reference to our statutes, the first law of the state on the subject of quarantine was the "Act to prevent the bringing in and spreading of infectious distempers in this state," passed 4th May, 1784, at the seventh session of the legislature. (1 *Greenl. Laws N. Y.*, 117.) By this act, quarantine was to be performed at Bedlow's Island, or in such other place, and for such time, and in such manner, as the governor—to whom, by the act of March 29, 1784 (*id.*, 69), the island, called Governor's or Nutten Island, was assigned—or, in his absence from the city of New-York, as the mayor thereof should direct and appoint. This act contains the germ of our present quarantine system; and the provision in section three, for the appointment, by the governor and council, of a physician to inspect all vessels which may have on board, or which may be suspected of having on board, any person or persons infected with a contagious distemper, is probably the earliest provision of law in the state for the selection of a person to perform the duties of the present health officer of the port of New-York.

This act was amended on the 27th March, 1794 (3 *id.*, 146), and by section five of the amendatory act the governor was authorized to appropriate Governor's Island for the purpose of erecting buildings, &c., for the reception or accommodation of any persons infected with any such distemper. On the 1st of April, 1796, another act was passed (*id.*, 305), the first provision of which is: "That a person practicing physic shall be appointed health officer for the city of New-York;" and extended powers are conferred upon him, most

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of which he possesses to this day. By the fourth section, the governor was authorized to "cause a building suitable to serve for a lazaretto, the expense whereof, exclusive of the moneys to be expended for the purchase of lands, if any shall be purchased, not to exceed the sum of two thousand pounds, to be erected on Nutten Island, or on other lands which may be deemed more eligible, and which other lands he is hereby authorized to purchase for the people of this state for the reception of persons," &c., subject to quarantine. The act of February 10, 1797 (*id.*, 367) extended the powers of the health officer to coasting vessels coming from any place south of Cape May, if he should "deem it expedient."

By the act of March 30, 1801 (1 *Webs. Laws N. Y.*, 361), it was enacted "that there shall continue to be a health office in the city of New-York, under the superintendence of three commissioners, who shall consist of a health officer, and of a physician, to be styled the resident physician, and one other person; that the health officer *shall reside at Staten Island*, the resident physician in the city of New-York, and the other commissioner at or *near the Marine hospital on Staten Island*, or in the city of New-York, as a majority of said commissioners may deem most proper."

This act fully established a quarantine system substantially like that of the present day. Many of its provisions continue through all subsequent revisions almost unchanged till now. The twentieth section (*id.*, 368) declares: "That the hospital erected on the easterly part of Staten Island shall continue to be denominated the Marine hospital, and shall, together with the other buildings and improvements made or to be made thereon, at the discretion of the said commissioners, and the land adjoining the same and belonging to the people of this state, be holden by the commissioners of the said health office in trust for the use of the people of this state, and the purposes specified in this act; and all vessels subject to quarantine shall come to anchor as near as may be to the said hospital, which is hereby declared to be the

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anchoring place for vessels at quarantine; that the said health officer shall be physician of the said hospital, and the said commissioners of the health office shall in other respects have the superintendence thereof, and employ mates, nurses and attendants, and provide bedding, clothing, fuel, provisions, medicine, and such other matters as shall be requisite therein; and it shall be lawful for them to make reasonable rules and orders for the government and management of the said hospital."

The provisions in section twenty-two of this act, in regard to persons eloping from quarantine, their apprehension and delivery to the health officer, to be detained at quarantine till regularly discharged by him, closely resemble some of the provisions of *Laws of 1856* (*ch.* 147, § 14).

By this act (that of 1801), the quarantine establishment was reduced to a regular system, and endowed with vigorous and efficient powers. It had then been already located where it now is, and the hospital had been erected; doubtless under the authority conferred on the governor by section four of the act of April 1, 1796. It has ever since continued in that location, and has been the object of the constant attention and care of the legislature. The numerous laws that have since been passed, and the generous grants that have at times been made for its support, evince an unvarying design, on the part of the state, to omit nothing essential to the completeness and efficiency of the establishment. And if the intention of the legislature may be inferred from their silence, as well as from their enactments, this quarantine establishment was deemed amply sufficient to guard the health of the whole state. For, until a very recent period, it was, if I mistake not, with the exception of the boards of health of New-York, Albany, and a few similar places, the only regularly constituted sanitary authority, and the only permanent sanitary establishment in the state.

The provisions of sections thirty-four and thirty-five of this act (1 *Webs.*, 374), which are the same as those of the

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Laws of 1811 (ch. 175, § 33), which latter was revised and reenacted on the 26th of March, 1813 (2 *R. L.*, 536), seem to contain the only warrant for the exercise, by the officers of the towns, of any of the powers of a board of health. The same provisions are contained in sections forty and forty-one of the "Act to provide against infectious and pestilential diseases," passed April 14, 1820, by section forty-five of which the former act seems to have been repealed. (*Laws of 1820*, 222, 223.)

That act was repealed, and another with the same title enacted in its stead, on the 21st of March, 1823. (*Laws of 1823*, ch. 82, p. 54, § 51.) Sections forty-four and forty-five of this latter act are evidently a revision of and a substitute for sections forty and forty-one of the act of April 14, 1820. But, in the revision, all the powers of the town officers are taken away, and the health laws are confined to quarantine and the cities of New-York, Albany and Hudson, and the town of Brooklyn.

The act of March 21, 1823, was repealed by the general repealing act, passed on the adoption of the Revised Statutes. (3 *R. S.*, 146, pl. 383.)

The fourteenth chapter of the first part of the Revised Statutes, as proposed by the revisors, contained no provision similar to those referred to in sections thirty-four and thirty-five of the act of March 30, 1801, and of some subsequent laws. (2 *Revisors' Rep.*, ch. 14, p. 42.) In the enactment of this chapter, the legislature inserted section twenty-two of title seven. (1 *R. S.*, 451; 3 *id.*, 504, 2d ed.) This section provides that "any two justices of the peace, in any town of this state, may cause all persons who shall be sick of any infectious or pestilential disease, and *not being residents of such town*, by an order in writing, to be removed to such place of safety within the town as they shall deem necessary for the preservation of the public health."

Such has been the general course of the legislation of the state, and such the comparative care and attention bestowed

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by the legislature on the quarantine establishment, on the one hand, and the subject of sanitary powers and regulations, in the towns of the state, on the other, up to the passage of the "Act for the preservation of public health," on the 10th day of April, 1850. (*Laws 1850, ch. 324, p. 690.*) But on the same day an elaborate "Act relating to the public health in the city of New-York," was passed (*Laws 1850, ch. 275, p. 597*), which seems (*id.*, 615, § 38) to be a careful revision of all statutory provisions on the subject of the act up to that time.

It is, in my judgment, clearly my duty to construe these two laws, or such as may be substituted for one or the other of them, together ; so that both may stand, if it be possible. If that cannot be done, if they are irreconcilably in conflict, then it seems to me that the institution of the state, founded almost with the state itself, the object of its bounty and its constant legislative attention, presided over by officers carefully selected by the highest executive authorities of the state, and who are vested with large powers and set apart for the performance of highly important and delicate duties, permanent, comparatively speaking, in the tenure of their offices, presiding over the health of great cities which are exposed to infections by a widely extended commerce with all the ports of the world ; that institution is to be preserved, to be kept in full vigor and efficiency ; it is not to be sacrificed to the local, limited board of health of a town or village, whose members may change from year to year, meeting only when "in the opinion of a majority of such board the public good requires it," and composed in many, if not in almost every case, of men not physicians, or familiar with disease.

It was expressly conceded on the argument, and, had it not been, I am bound judicially to notice, that that place in the town of Castleton mentioned in the regulation of its board of health, and there stated to be "commonly known as the quarantine inclosure," is the quarantine establishment of the

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state, and that it includes the marine hospital mentioned in the *Laws of 1850* (ch. 275, tit. 2, § 1), and in the *Laws of 1856* (ch. 147, § 1).

It is not to be denied that very broad and extensive powers are conferred upon the boards of health of the several towns of the state by section three of the "Act for the preservation of the public health." Subdivision four of this section, as above stated, gives such boards power "to regulate and prohibit or prevent all communication or intercourse by and with all houses, tenements and places, and the persons occupying the same, in which there shall be any persons who shall have been exposed to any infectious or contagious disease."

It was claimed on the argument that this authority was broad enough to warrant the framing of the regulation now under examination; and so, indeed, it does in terms appear to be.

It must be remarked, however, that a comparison of the two acts will not show any necessary conflict between them. Their provisions harmonize. As they were passed together, so, it seems to me, they can stand together, if the officers appointed to carry them into effect act in the proper spirit. But when a comparison is instituted between this regulation of the board of health of Castleton and the statutes establishing and regulating the hospital and quarantine establishment, they are found to be in irreconcilable conflict. The regulation must therefore be void.

This board of health, like the directors of a corporation, in framing its by-laws, was bound to frame them so as to accord with, not to violate, the provisions of the law. The legislature had a right to presume that the board, in making their regulations under this section, would act in obedience to other statutes, instead of attempting to suspend or repeal them. The legal obligation so to do is as apparent as if a proviso had been added to the section expressly declaring that the ordinances of the board were to be such only as

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should not conflict with the constitution or laws of the state. It could never have been the intention of the legislature to put into the hands of any board or tribunal in the state the power to suspend, or repeal, or override a statute; and that, especially, when the repeal would be merely local and temporary, like the sessions of the board of town officers in a sickly season.

It was, however, insisted by the counsel for the people that this regulation, which "prohibits all persons from passing from within the quarantine inclosure into any other part of the town of Castleton," was not invalid or void, because the inmates of quarantine might, by shipping or boats from its water front, pass entirely round the town of Castleton, and land in other towns or counties. It is at least very doubtful, upon a comparison of the sweeping terms of this regulation with the boundaries of the county of Richmond and town of Castleton, as fixed by law (3 R. S., 2, pl. 4, 3d ed.; *id.*, 20, § 4, pl. 1), whether even that mode of exit from quarantine is not a misdemeanor, punishable by fine and imprisonment, if this regulation is valid; for the county and town are bounded northwardly and eastwardly "by the middle of the main channel of the bay and harbor of New-York," and it will be difficult to establish that the lands and waters covering them, between the shore and the middle of the channel, are not "within the quarantine inclosure," and, on the landward side, the town of Castleton wholly incloses the quarantine. Let it be admitted, then, as contended, that this argument is a verbal subtlety, and let us assume that egress from quarantine by water is not prohibited by this regulation of the board of health, yet, if this board can do what they claim the right to do on the landward side of quarantine, may they not also on the seaward side? And if so, what this town does upon one of the boundaries of quarantine may be done along the boundaries of every town in the state, if, in the opinion of the majority

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of the board of health of the town, "the public good requires it." What is, then, the state of things in quarantine?

At some seasons, we know that emigrants arrive there in great numbers, and the hospitals are filled. A panic is of easy growth. The inhabitants of the adjoining towns become alarmed: it may be, with some just grounds of apprehension; perhaps without such grounds. If three out of the five men composing the town boards of health shall be of the opinion that, "the public good requires it" (rather an indefinite rule of action), they may pass an ordinance like the one in question, and absolutely prohibit the coming among them of any person from quarantine. How, then, are the health officer and the physician of the hospital to provide nurses, servants, attendants; to obtain food, clothing, medicines? How are the pilots of the port to perform their duties? They are by law (*Laws 1856, ch. 147, §§ 8, 9, 10*) to bring every vessel they find to be infected into the anchorage at quarantine, and to report all the violations of that law, as soon as may be, to the health officer. Can they, by merely stepping on the deck of a vessel outside Sandy Hook, and going ashore from it at quarantine, to report to the health officer, be prevented by a regulation like this from pursuing their calling? For that is, or may perfectly well be, the effect of such a prohibition. And what, then, becomes of the commerce of the port?

By section fifteen of the same act, the commissioners of emigration are required to "remove from the marine hospital and take charge of all indigent emigrants whose quarantine has expired, and who shall have sufficiently recovered from the diseases with which they were admitted, on the notification, in writing, of the health officer that such removal will not, with ordinary care, endanger the safety of the individual or the health of the community." Suppose such a notice to be given by the health officer to the commissioners of emigration: one of them goes into the quarantine inclosure, with proper assistants and means of conveyance, to remove

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such emigrants; but, on offering to leave quarantine. the way is absolutely closed by this ordinance of the town of Castleton. He turns to the next adjacent town on the island, or to the contiguous town in Kings county, and finds, or he may find, if this ordinance is valid, a similar barricade blocking his way there. But the statute requires that he "shall remove" the emigrants and take charge of them. Whom shall he obey, the officers of these towns or the statutes of the state?

But this is not yet a full statement of the case. The health officer himself, as well as the physician of the hospital, and all their deputies, assistants, nurses and orderlies, are clearly within the terms of the regulation, and are absolutely prohibited from passing out of the quarantine inclosure. The health officer is (*Laws 1850, ch. 275, § 4*) made one of the commissioners of health of New-York city. By other provisions of the statute, he is required to attend the meetings of the commissioners, at the city hall, in New-York, daily; while he is also required by law "to reside within the quarantine inclosure." How is he to comply with these several requirements? If he can be prevented from making use of the streets in Castleton, its docks and wharves, and the same ferry accommodations that other residents of that town avail themselves of in passing to and from his duties in New-York, is he not seriously crippled in the performance of functions of the most vital importance to the whole population of all these cities and towns? He is, in my judgment, clearly entitled to enjoy every facility for the discharge of his onerous duties; and this as well from the clear spirit of the law as from the express provisions of the statute, that "it shall be the specific duty of all magistrates and civil officers, and of all citizens of the state, to aid, to the utmost of their power, the board of health, and all the health officers mentioned in this act, in the performance of their respective duties." (*Laws 1850, 615, § 36.*) But if this regulation is valid, a similar act of the board of health in New-York may

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prohibit his landing on any wharf or passing through any street in that city, and absolutely prevent the performance of his statutory duties.

It was, however, contended on the argument that he had no right or power to perform any official act or discharge any duty outside the quarantine inclosure. There are many other provisions of law than those above referred to, which show that he may, if they do not clearly require that he shall, go abroad from the inclosure to perform his duties. (*Laws of 1856, ch. 147, §§ 12, 13, subds. 1-4, § 14, &c.*) But were the position correct, it is, at least, a matter of doubt if that officer, whom the state has selected to ward off infection and disease from its whole people, can, by the board of health of a city or town, be declared to be so dangerous to public health, by reason of the mere performance of his statutory duties, that he may be absolutely prohibited from leaving the quarantine inclosure. If he may, then the board of health in Northfield or Southfield might impose the like restraint on the physician who has been appointed health officer of Castleton by its board of health, should it be found that he was attending a case of small-pox or infectious fever.

But it was also contended, in argument, that this regulation might be void so far as the health officer was concerned, and yet be good as to the prisoner and others.

Although I cannot admit the soundness of the position, nor allow that a prohibition to all persons means, and shall include, only certain classes of persons, and may therefore be valid, still, it may be proper to treat it for a moment as sound, and to look at the regulation from another point of view.

Suppose a person, no matter whether he be a destitute seaman or emigrant, or the wisest, best and richest citizen in the state, has arrived at the anchorage ground in a vessel, and has been found sick with the yellow fever; has been sent by the health officer to the marine hospital; has been

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attended there by its physicians and nurses, and has been reported by the physician, to the health officer, "as sufficiently recovered from sickness to be discharged from the hospital" (*Laws of 1856*, 239, § 35, *subd.* 3); suppose him, also, to have received from the health officer such a discharge as that officer is, by section fourteen of the same act, authorized to grant: what are the rights of such a party? The state has subjected him to a long confinement, it may be to a very onerous one, at great loss in a pecuniary point of view, and to the deprivation of many comforts which he might have enjoyed at his own dwelling, outside the quarantine inclosure. To have gone out, even to his own house, would have made him "guilty of a misdemeanor, punishable with or by fine and imprisonment." (*Id.*, § 13.) But he has submitted to all the requirements of the state authorities, and has passed through the period of quarantine. Has not the state, by imposing these penalties, incurred reciprocal duties? Shall it not in return assure to him the right of restoration to civil and social life? Can it be that upon the outside of the wall there are another set of functionaries, who may subject him to another similar detention? But let him submit to that in Castleton; is he still safe? When he reaches Northfield or Southfield, or crosses into New Utrecht, may not each of those towns, in succession, "put him to his purgation?"

And where shall this state of things stop? Clearly, if it may exist in Castleton, it may in every town between that and Canada. The result shows the entire absurdity of the attempt to assume such powers. It shows that the decision of the proper officers in quarantine is final and conclusive; that at least there is not, and in the nature of things cannot be, any such board of appeal from those decisions as the town authorities of Castleton have sought to set up.

I have said that this illustration shows the entire absurdity of the regulation in question. That, however, is not strictly true. For the regulation "prohibits all persons from coming

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from the quarantine inclosure into any other part of the town." It does not allow to the outside board of health themselves, or to any other authority, either the right or the power to examine persons offering to leave quarantine; to decide that some are fully cured, and may, therefore, again mingle in life, while others are not yet fully freed from infection, and therefore require further care, and to be sent to the lazaretto of the town, that their cure may be completed.

The health officer can send to the hospital only those that are sick, and can retain in quarantine only for limited periods those who have been exposed to infection. But this regulation sentences all persons, well or sick, whether exposed to infection or not, to an unlimited imprisonment. That imprisonment, too, it may be added, is not such an one as under any quarantine law can be adjudged to be valid; for it is one where the restraining power does not take, and cannot by possibility take, any measures whatever either to support the life or to improve the health of the party confined, or to free him from infection, that at some future period he may again enjoy the privileges of a member of society.

Such a regulation is clearly not a compliance with the provisions of the statute constituting the town boards of health. With the power to prohibit is given, also, the power to regulate. The fourth subdivision "authorizes them to regulate and prohibit or prevent all communication or intercourse," &c. In my judgment they must exercise the powers of regulating and of prohibiting together. They can exclude from their limits, not "all persons," but such only as, on a proper examination, may be found dangerous to the health of the town. Certainly no person can look through the numerous statutes which the legislature have so carefully framed for the regulation of their officers at quarantine, and can observe with what caution every provision is made subservient to the comfort of patients and to

their prompt restoration to sound health and to their duties in society, and be blind to the fact that this regulation, now sought to be enforced by fines and imprisonments, is at open war with the whole policy of the state from its foundation. It assumes powers and claims rights and privileges never yet arrogated by the supreme legislative body of the state, that fountain whence this board derives not only its authority, but its very existence. To sustain such assumptions is to create in every town in the commonwealth an irresponsible tribunal, whose only rule of action shall be what, in their opinion, "*the public good requires.*"

The public health is doubtless an interest of great delicacy and importance. Whatever power is in fact necessary to preserve it will be cheerfully conferred by the legislature, and carried into full effect by the courts.

But it can never be permitted that, even for the sake of the public health, any local, inferior board or tribunal shall repeal statutes, suspend the operation of the constitution, and infringe all the natural rights of the citizen.

I feel no hesitation in declaring this regulation void. Disobedience to it constitutes no crime. The prisoner is discharged.

SUPREME COURT. Erie General Term, September, 1856. *Bowen, Marvin and Mullett*, Justices.

THE PEOPLE *v.* SAMUEL JILLSON.

Under the thirty-fifth section of the act of 1850, entitled "An act to authorize the formation of railroad corporations, and to regulate the same," a conductor of a train is protected against an indictment for assault and battery, for putting out of the cars a passenger who refuses to pay his fare, if he use no unnecessary force; and where a passenger has refused to pay his fare, and the train has been stopped for the purpose of putting him out of the cars, the right of the conductor to put him out is not taken away by his then offering to pay the fare.

The relations and rights of a passenger, as regards the railroad company in whose cars he travels, discussed by MULLETT, J.

THIS was a *certiorari* to the court of sessions of Genesee county.

It appeared, by the return to the said writ, that Samuel Jillson was, on the 26th day of September, 1854, indicted in the said Court of Sessions, for an assault and battery on James McCormick, and that the indictment was tried in the said court on the 28th day of September, 1855; upon which trial the following bill of exceptions was taken by the counsel for the defendant, and signed and sealed by the court:

"It was admitted, on the part of the people and of the defendant, for the purposes of the said trial, that, during the month of August, 1854, the Canandaigua and Elmira Railroad Company were a corporation organized under the law of this state; that they operated a railroad from Elmira to Niagara Falls, through the villages of Le Roy and Batavia, and that the defendant was employed by them as a conductor on said road. It was proved on the trial that, in August, 1854, James McCormick, the complainant, took a seat in the cars of the company, at Le Roy, to be carried to Batavia, a distance of ten miles; that soon after the train left Le Roy the defendant, as the conductor of the train, came

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to McCormick to receive his fare ; that McCormick told him he was going to Batavia, a distance of ten miles, and tendered him a twenty-five cent piece as the fare ; that the conductor declined to receive it, and told him the fare was thirty cents ; that McCormick said he had frequently been carried over the road from Le Roy to Batavia, and had never paid but twenty-five cents ; that the defendant told him the company had recently made a regulation requiring passengers who did not purchase tickets before taking their seats in the cars to pay at the rate of three cents a mile ; that McCormick replied that he should not pay but twenty-five cents ; that the defendant then told McCormick that he left no other way for him, the conductor, but to stop the train and let him, McCormick, get off ; that McCormick said the conductor would have to put him off, as he should not pay but twenty-five cents ; that the conductor then pulled the bell-rope, as a signal to the engineer to stop the train, and the speed of the train was slackened ; that after the bell-rope was pulled and the train had slackened its speed, but before it had quite stopped, McCormick offered to pay the defendant the thirty cents, but the defendant told him that as he had obliged him to stop the train the offer was too late, and declined it ; that the train having stopped, the defendant laid one or both hands on McCormick's shoulder or arms, without hurting him, and told him he must leave the train ; and that thereupon McCormick said he would leave rather than to have a fuss, and voluntarily rose from his seat and left the train while it was not in motion. It was also proved that, in the fore part of July, 1854, the company made a regulation, to take effect on the fifteenth of that month, by which passengers not purchasing tickets before taking seats in the cars, should be charged at the rate of three cents a mile, and that printed notices of such regulation were posted, on the fourteenth of said July, in conspicuous places at the passenger station at Le Roy, and remained so posted there several months. It was also proved that the place where

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the train was stopped, for the purpose of putting the complainant out of the cars, was near the Le Roy station and several dwelling-houses; and the District Attorney stated that he did not claim but that it was a proper place for that purpose, provided the defendant had a right in other respects to put him off. There was no conflict of evidence upon any material fact in the case.

The court charged the jury that the company had a right to make the regulation proved, and it was the duty of the defendant, as the agent of the company, to enforce it; that the complainant was bound to pay the fare demanded, and, having refused to do so, the defendant had a right, and it was his duty, to stop the train and put him off.

The defendant's counsel requested the court further to charge the jury that the defendant was not bound to receive the fare tendered after the signal to stop the train had been given and the speed of the train had slackened. The court refused so to charge, to which refusal and ruling of the court the defendant's counsel duly excepted.

The court further charged the jury that although the defendant had a right to put the complainant off the train on his refusal to pay the fare demanded, yet that right was done away by the complainant's subsequent offer to pay; and the defendant was bound to receive the fare, and permit the complainant to remain on the train. To which ruling and decision of the court the defendant's counsel duly excepted.

The defendant's counsel also requested the court to charge the jury that, in any view of the facts, the defendant, upon the law of the case, was entitled to an acquittal, but the court declined so to charge. To which refusal and ruling the defendant's counsel duly excepted.

Upon which evidence the jury convicted the defendant; and the defendant's counsel presented, and the court signed and sealed, the above exceptions.

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This *certiorari* was argued in this court, at the September general term, 1856, by

Smith & Lapham, for the plaintiff in error.

S. Wakeman (District Attorney), for the defendant in error.

By the Court, MULLETT, J.—Although the subject matter of the controversy between Jillson and McCormick, in a pecuniary point of view, appears to have been trifling, yet the principles involved in it are of great importance, both to railroad companies and to their passengers. That railroad corporations are to be deemed carriers of passengers, and as such subject to the duties and liabilities, and entitled to the privileges and powers, incident to that employment, seems to be now well settled by various judicial decisions, as well in this country as in England. (*Camden and Amboy R. R. and Transp. Co. v. Burk*, 13 *Wend.*, 611; *Holbrook and Wife v. Utica and Schenectady R. R. Co.*, 16 *Barb. S. C. R.*, 113; *Hagerman v. Western R. R. Co.*, *id.*, 353; *The Commonwealth v. Powers*, 7 *Metc.*, 576; 1 *Am. Railw. Cas.*, 396, note 1; *Pickford v. Grand Junction R. R. Co.*, *Mees. & Wels.*, 372.)

As corporations, they have a privilege to use their own united powers and property in a particular way or business, as well for the benefit of the people generally as for themselves. They, like common carriers of property, exercise a public employment, which they have no right, unreasonably, to decline; but they are not, like common carriers, insurers of the persons carried, and absolutely liable for all injuries except those occasioned by the acts of God or a public enemy, though they are to conduct their business, in all its branches, with all the care which human prudence and skill can suggest. Anything short of this will make them liable for the consequences. (16 *Barb. S. C. R.*, 113, 355.)

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A railroad company, both as the proprietors of their road, the houses, buildings, engines and other real and personal property connected with the road, and as carriers of passengers, have authority to make reasonable and suitable regulations in regard to persons proposing to pass or repass on the road in the passenger cars, and in regard to all other persons making use of such road, houses, buildings, engines or property. Such authority is incident to the ownership of the property, and to their employment as passenger carriers; and all such regulations will be deemed reasonable which are suitable to enable the company to perform the duties they undertake, and to secure their own just rights in such employment, and also such as are necessary and proper to insure the safety and promote the comfort of passengers. (7 *Metc.*, 596; *S. C.*, 12 *id.*, 482; *Cheney v. Boston and Maine R. R. Co.*, 11 *id.*, 121; *Chillon v. London and Roydon R. R. Co.*, 5 *Eng. Railw. Cas.*, 4; *Eastern Counties R. R. Co. v. Broom*, 2 *Eng. L. and Eq.*, 406; *Roe v. Birkenhead and Lancashire R. R. Co.*, 7 *id.*, 546.)

The power which the company have to make and enforce such regulations they may delegate to suitable officers, as agents of the company. Indeed, this is the only mode in which a corporation aggregate can exercise its powers. (7 *Metc.*, 596.) The regulations which the company may make do not partake of the nature of penal laws, to punish the passenger for having done or neglected to do any act, but are simply an annunciation of the terms and conditions upon which the company propose to let the passengers have seats in their cars, or to partake of the use of their road, or some part thereof, for the time being. They are made to regulate the future intercourse between the carriers and the passengers, and not to redress or punish former violations of duty. In the case of *Hall v. Powers* (12 *Metc.*, 482), the Supreme Court of Massachusetts refused to sanction the proposition that a superintendent of a railroad station had a right to order a person to leave the station and not to come

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there any more, and to remove him by force if he did come, if, in the judgment merely of the superintendent, such person had violated the regulation of the company, but conceded that the superintendent might rightfully remove persons who actually violated such regulation. (*Am. Railw. Cas.*, 396, note 1.) By the above proposition it appears that the relation between a railroad company and him who travels on the road as a passenger is not founded upon a contract, express or implied, but is governed by the general duties of the company as a common carrier of passengers, and such reasonable and proper regulations as the company may, from time to time, make for the security of their own just rights and the safety and comfort of the passengers. The passenger, by availing himself of the privileges of a passenger, assumes the duties of one. The whole relation is formed with railroad rapidity and accuracy. The railroad company, by being the owner and having the possession of the road, cars, and machinery for running them, and being responsible for the safe and proper conducting of that business, has the power as well as the right to enforce a compliance with the terms of this relation on the spot. This right they have as well by the general principles of the common law as by the statute. (*Laws of 1850*, 231, § 35.)

In the case under consideration, McCormick had taken his seat as a passenger. This he had a right to do without any contract or agreement with the conductor or company for that purpose, unless the conductor for some cause connected with the general conduct of his business, or the safety or comfort of his passengers, had forbidden him. By taking the seat he assumed the duties of a passenger, one of which was to pay the fare when called on. By the thirty-fifth section of the act of 1850, to authorize the formation of railroad corporations, and to regulate the same, it is declared that, "if any passenger shall refuse to pay his fare, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars, using

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no unnecessary force, at any usual stopping place, or near any dwelling-house, as the conductor shall elect on stopping the train." If McCormick, in this case, did not violate the thirty-fifth section of the railroad act of 1850, it is difficult to understand how he could do so. When the conductor called upon him for his fare, told him what it was, and even referred to the regulation of the company fixing it at the amount demanded, McCormick replied that he should not pay but a less sum, naming it, and when the conductor then told McCormick that he left no way for him, the conductor, but to stop the train and let him, McCormick, get off, McCormick replied that the conductor would have to put him off, as he should not pay but the sum which he had offered; thus distinctly refusing to pay the fare and in effect defying the conductor to put him off. Under such circumstances it was the conductor's duty to put McCormick off the cars immediately, with as much expedition as was consistent with his safety and the safety and convenience of the other passengers. He had no right to detain or delay the train to dispute with an obstinate passenger about the amount of the fare. By refusing to pay the fare demanded, McCormick relinquished his privilege as a passenger and ceased to have any right in the cars, and the conductor was authorized to put him out as an intruder. It could not be that, while the conductor was rightfully engaged in putting a person out of the cars as an intruder, such person could, by his own act, acquire a superior right to remain.

Although, from the general nature of the business of a railroad company as carriers of passengers, and the general invitation which they hold out to persons to become passengers, persons, if not forbidden, have a right to take seats in the cars, as passengers, and to retain them, on complying with the regulations for running, without any particular contract for that purpose; yet, it appears to me that a conductor of a train of cars, as the agent of the owners, to enable him properly to manage the business, engines and property

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entrusted to his care, and to provide for the safety and comfort of the passengers, must have some power over the reception, rejection and expulsion of passengers, governed in some degree by his discretion, but for the reasonable and proper exercise of which he is responsible, and that the exercise of that discretion will be presumed to be reasonable and proper, unless shown to be the contrary.

Therefore, in the case under review I am of the opinion that the Court of Sessions erred in charging the jury "*that, although the defendant had a right to put the complainant off the train on his refusal to pay the fare demanded, yet that right was done away by the complainant's subsequent offer to pay, and that the defendant, under the circumstances of the case, was bound to receive the fare and permit the complainant to remain on the train,*" and that for this error the verdict in the Court of Sessions must be set aside and a new trial granted.

Conviction reversed and new trial ordered.

ERIE OYER AND TERMINER. September 10, 1856. Before *Marvin*, Justice of the Supreme Court, and the Justices of the Sessions.

THE PEOPLE v. LEON TIPHAINE.

The act entitled "An act for the prevention of intemperance, pauperism and crime" being unconstitutional, the provisions of the Revised Statutes on the subject were left in full force, notwithstanding the clause in the act repealing all previous statutes inconsistent with its provisions.

THE defendant was indicted for a violation of the excise laws. The indictment contained numerous counts, which were generally framed under the Revised Statutes relating to excise and the regulation of taverns and groceries. All the counts charged the sale of spiritous liquors without

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license, and some of the counts alleged the sale in quantities less than five gallons. The defendant demurred.

A. Sawin (District Attorney), for the people.

F. J. Fuhian, for the defendant.

By the Court, MARVIN, J.—“Whoever shall sell any strong or spiritous liquors, or any wines, in any quantity less than five gallons at a time, without having a license therefor, granted as herein directed, shall forfeit twenty-five dollars.” (1 R. S., 680, § 15.) “All offences against the provisions of this title shall be deemed misdemeanors, punishable by fine and imprisonment.” (*Id.*, 682, § 25.) Are these provisions of the Revised Statutes in force? There is published, in the volumes of Session Laws of this state for 1855, what purports to be “An act for the prevention of intemperance, pauperism and crime.” (*Id.*, ch. 231.) In the twenty-fourth section it is declared, “all acts and parts of acts, and all charters and parts of charters, inconsistent with this act, are hereby repealed.” The provisions of the Revised Statutes, above quoted, are inconsistent with the so-called act of 1855. The latter act assumed to provide an entirely new system, as a substitute for the system of the Revised Statutes, touching the sale of liquors. By the first section the sale of intoxicating liquor is prohibited generally, except as thereafter provided. This prohibition includes all intoxicating liquors, without regard to quantity. The Revised Statutes had no relation to strong or spiritous liquors in quantities exceeding five gallons. The second and third sections of the act of 1855 assume to regulate the sale of intoxicating liquors. The fourth section makes a violation of the provisions of the preceding sections a misdemeanor, and inflicts penalties, &c. The recent decisions of the Court of Appeals, in effect, pronounce these four sections of the act of 1855 unconstitutional. Judge Selden says: “The conclusion to which I

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am thus brought is necessarily subversive of the first four sections of the law, in their present form." I shall not remark further upon the decisions of this court, or the opinions delivered, but shall proceed upon the ground that the first four sections are in conflict with the constitution, and that they are therefore void. What will be the consequence of this position? These sections contained the substitute for the prohibitions and licensing system of the Revised Statutes, and they were inconsistent with the provisions of the Revised Statutes. If the provisions of these four sections were valid and obligatory as law, they necessarily abrogated the provisions of the Revised Statutes. It may be said, perhaps, that they were not inconsistent with the general prohibition contained in section fifteen. That section impliedly permitted the sale of spiritous liquors in quantities exceeding five gallons. The prohibition in the act of 1855 extended to all intoxicating liquors without regard to quantity. By the fifteenth section of the Revised Statutes the sale was unlawful only when made "without having a license therefor, granted as therein directed;" and the act of 1855 assumed to abrogate the license system as provided in the Revised Statutes. In short, had the first four sections of the statute of 1855 been valid, no action or indictment could have been based upon the fifteenth section of the Revised Statutes. As these four sections, containing the system substituted for and inconsistent with the Revised Statutes, are, however, null and void, having no force as law, how can it be said, in a judicial and legal sense, that they are inconsistent with the provisions of the Revised Statutes? All acts inconsistent with this act are hereby repealed. What is the meaning of "*this act*?" What construction shall be given to those words? Shall we say that they include all the language and provisions of what professes to be "An act for the prevention of intemperance, pauperism and crime?" If we adopt this mode of construction, the

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provisions of the Revised Statutes are abrogated. In my opinion this is not the proper construction.

If the legislature has made a prohibition in the form of a statute, which it was not authorized by the constitution to enact as a statute, it is not a statute; it is not a law. The legislative power is vested in a senate and assembly, but this power is not unlimited. It is restricted by the fundamental law which the people themselves have enacted, to wit, the constitution. The legislature, in exercising the power conferred, enact laws, and the law is called a statute, or, "*an act.*" When the legislature transcends its power, their acts or doings are void; and whatever language they may have used, and in whatever form they may have put it, they have not succeeded in bringing into existence "*an act.*" Law is a rule of action; municipal law is a rule of civil conduct prescribed by the supreme power in the state. (1 *Bl. Com.*, 44.) The laws consist of the unwritten laws (common law) and of the written or statute law.

Blackstone says the written laws of a kingdom are statutes, acts or edicts. (1 *id.*, 85.) "*Act,*" in legislation, is a statute or law made by a legislative body; as an act of congress is a law by the congress of the United States, an act of assembly is a law made by a legislative assembly. (*Bouv. Law Dic.*, "*Act.*") Acts are general or special, public or private. All legislative acts are laws, and if not laws, then they are not acts of legislation. In my opinion it is important so to regard the words "*this act,*" when used in that clause of a statute repealing all statutes or acts inconsistent with it. If this construction is not given, very strange and anomalous results may follow, and it may often be difficult to determine what the state of the law is. Suppose the legislature attempts legislation touching a subject already embraced by the law, and declares that all statutes or acts inconsistent with it are repealed, and it is held that the entire act is unconstitutional and void: would it be claimed that the prior acts had been affected by the repealing clause? If so, the

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legislature, without designing it, might leave the whole subject of the prior act or acts without any law whatever. Indeed, such would be the effect in reference to the subject we are considering. Now, there is not a man in the whole state who supposes that the legislature had any intention of repealing the Revised Statutes relating to excise and the regulation of taverns and groceries, and substitute nothing in their stead.

If a statute repeals a prior statute, and then a subsequent statute repeals the repealing statute, the statute first repealed is at once revived. This is the common law rule; and why? The repealing act being annulled, struck out of existence, it is as though it had never been. Now, in the present case, strike out the unconstitutional provisions in the act of 1855 and there will be nothing in the Revised Statutes touching excise, &c., inconsistent with all that shall remain in the act. There will be some remainder, though small. It contains some new provisions which do not conflict with anything in the Revised Statutes, and which are not in conflict with the constitution. In my opinion, it would be extremely dangerous to adopt any other mode of construction when applied to our system of legislation, where the constitution is a law to the legislature; and when they exceed their power all their acts and doings are void. Before we can say that any of the valid, binding laws of the state are inconsistent with another law, we must know and hold that such other law has been enacted, and that it is valid and binding. This must be so, not only in relation to statutes, but also in relation to any attempt to change the common law.

Without pursuing this question further, in my opinion the proper judicial and legal construction of the words "this act," as used in section twenty-four of the statute, will include only such provisions of the act as are constitutional. And as there will remain nothing in the act inconsistent with the provisions of the Revised Statutes upon which most of the counts in the indictment are founded, it follows that the

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demurrer is not well taken. Some of the counts are good and the demurrer is general. We might stop here. The indictment, however, contains some counts in which the averment "in a quantity less than five gallons" is omitted. The counts all contain the averment of sale without any lawful authority, admission or allowance, and without being licensed thereto or therefor according to law. Enough has been said to show that sales of intoxicating liquor, in quantities exceeding five gallons, is not unlawful. Those counts in which the allegations of sale, in a quantity less than five gallons, is omitted, are not good.

It has been argued that all sales in quantities less than five gallons are unlawful, and that, as the law now is, there is no authority to license the sale. This latter position is important, and I shall briefly consider it. As we have already seen, the prohibition, in the Revised Statutes, of sales in quantities less than five gallons, is not unqualified. The sale "without having a license therefor, granted as herein directed," is prohibited. The statute provided a licensing system. Is that system abrogated? It is claimed that it is, in express terms, and that the effect of all the legislation and the decisions of the Court of Appeals is, that all sales in quantities less than five gallons are unlawful, and that there is no authority anywhere to license or permit sales in small quantities. If this is so, a result has certainly been produced never anticipated by the legislature or any man in the state. The legislature, in the act of 1855, undertook to confer the right to sell in any quantities upon certain persons who should comply with the provisions of the act, as specified in the several sections. This section has fallen by the decision of the Court of Appeals. By the twenty-fifth section of this act, it is declared that "no license to sell liquor, except as herein provided, shall be hereafter granted." This provision is undoubtedly clear and express, and would require no construction but for the facts aside from itself.

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If the act had provided for granting licenses, then undoubtedly all other licenses would be prohibited; but it turns out that the act contains no provisions for granting licenses. I mean, of course, no valid provisions; as the Court of Appeals have held that those sections of the act, declaring who may sell and under what circumstances, are void. The legislature refer to those provisions inaccurately as authorizing licenses. Their meaning is sufficiently obvious in this respect, and I will not remark upon the inaccuracy. But as, in law, no provision is made in the act authorizing licenses, or sales at all in any quantity, what construction shall we give to this provision of the act?

Shall we leave out the exceptions and read it thus? "No license to sell liquor shall hereafter be granted." No one can fail to see that this would be directly contrary to the intention of the legislature. The great leading and fundamental rule for the construction of statutes is to ascertain the intention of the legislature. It is often necessary to examine with care and to consider the entire act, and sometimes previous and cotemporaneous legislation, for the purpose of ascertaining the intentions of the legislature. In the present case, the intention of the legislature was obvious enough. They designed to substitute a new system for the old licensing system, and they supposed they had; but there was an entire failure to accomplish the object or intention. They did not intend to abrogate the old license system and leave nothing in its place. The actual intention of the legislature has failed and cannot be carried into effect, and, in my opinion, this provision in relation to licenses should be held to be nugatory.

In examining wills, if the intention of the testator cannot be ascertained, the will is void for uncertainty. So if the intention is ascertained, but it violates well settled rules of law, or if it be impossible to carry the intention into effect, the will is void.

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In the present case, we have a right to look into the unconstitutional provisions of the act to which the legislature refer in the exception in section twenty-five, for the purpose of ascertaining their intention, and having ascertained it, we find that it cannot be executed or carried into effect. I submit that the whole provisions affected by the exception must fall.

It is safer to adopt this course than to speculate as to what would have been the intention of the legislature, or what the legislature would have declared touching licenses, in the absence of the provisions which they inserted in the bill, in relation to sales.

The courts have no power to legislate. Their province is simply to declare the law as legally enacted; and if the legislature, for any cause, has failed to make itself understood, or being understood, its intention is in conflict with the constitution, the courts are to say so, and the attempted legislation is a failure. I repeat, the intention of the legislature is clear enough. They say that certain persons may sell liquor, and they refer to this as a license, and then, in effect, say that no other license shall be granted. The system of sales provided by the legislature was a nullity. We know that they did not intend to abolish all sales in quantities less than five gallons. If we now hold, as the effect of the legislation, that all sales in quantities less than five gallons are unconditionally prohibited, we shall hold in direct conflict with the known intention of the legislature, as evinced in the Revised Statutes and the act of 1855. This, in my opinion, would be judicial legislation.

I think we should hold that the intention of the legislature, touching the question we are considering, cannot be carried into effect, as the provisions of the statutes, evincing that intention, are in conflict with the fundamental law. In my opinion, no effect can be given to that part of section twenty-five declaring that "No license to sell liquor, *except as herein provided*, shall hereafter be granted." The result is that the

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Revised Statutes relating to licenses are in full force. The board of excise may grant licenses, and all sales of strong or spiritous liquors, in any quantity less than five gallons at a time, without having a license therefor, granted as directed in the Revised Statutes, are unlawful. The demurrer must be overruled, and there must be judgment for the people upon those counts which are good, as herein declared.

Judgment for the people.

SUPREME COURT. Monroe General Term, December, 1856. *T. R. Strong, Welles and Smith*, Justices.

THE PEOPLE v. ABRAM ADLER.

Form of a *certiorari* to remove a cause from the Court of Sessions of a county to the Supreme Court, after verdict and before sentence.

A private person is permitted by law to arrest without warrant and take before a magistrate one who has committed a felony; but for mere misdemeanors, after their commission, an arrest can only be made upon a warrant from a magistrate.

The common law rule that petit larceny is a felony has not been changed by the Revised Statutes.

On trial of an indictment for assault and battery, it is a good defence that the complainant had committed petit larceny, and that the alleged assault and battery consisted in arresting him therefor, without process, and delivering him to a public officer.

CERTIORARI to the Monroe County Sessions. The writ of *certiorari* was in the following form:

The People of the State of New-York, to the Court of Sessions, in and for the County of Monroe, Greeting:

We, having been informed that Abram Adler, of said county, was lately in the said Court of Sessions tried and convicted of the crime of assault and battery, upon an indictment theretofore found against the said Abram Adler;

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and that, upon the said trial of the said indictment, exceptions to certain decisions of said court were made by the said Abram Adler, and that a bill of the said exceptions has been settled, signed and sealed by the judge composing said court, and filed with the clerk of said court; and we being willing, for certain reasons, that the said indictment and bill of exceptions, and other proceedings thereon, remaining in the said court, should be certified by the said court to, and removed into, our Supreme Court, do hereby command you, that you do certify and return, without delay, said indictment and bill of exceptions, and other proceedings thereon, into our said Supreme Court, together with this writ, so that the said Supreme Court may further cause to be done thereupon what of right and according to law ought to be done.

Witness, E. Darwin Smith, one of the justices of our Supreme Court, at the Court-house, in the city of Rochester, in the county of Monroe, the 24th day of July, in the year one thousand eight hundred and fifty-six.

WM. N. SAGE,

Clerk.

E. A. RAYMOND,

District Attorney of Monroe county.

The return showed that the defendant had been indicted in the Court of Sessions of Monroe county for an assault and battery on one Dennis Connors and pleaded not guilty.

The indictment was brought to trial on 7th March, 1856.

The District Attorney proved that the defendant, on or about 1st October, 1855, asked Connors, who was passing along in front of defendant's grocery store, in Rochester, to come into his store, and when in, that defendant seized hold of Connors by the collar, and held him there some time against his will, alleging that said Connors had, one week before that time, stolen from him ham and fish to the amount in value of \$3. The prosecution then rested.

The counsel for defendant then offered to prove that Connors had, one week before that time, committed petit lar-

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ceny, in stealing a piece of ham and some fish, of the value in all of \$3, the property of defendant; that seeing Connors pass, he seized him, and detained him upon the alleged charge, without any process or warrant, until he sent for a police officer to take him in charge, who did take him in charge and carried him before the police magistrate of Rochester.

This was objected to by the District Attorney, on the ground that even although a private person might arrest one who had committed a felony, yet that, for a mere misdemeanor (which, for the purposes of the defence, he alleged petit larceny to be), a private person, without warrant or previous investigation and process, could not arrest, and that if the defendant proved the facts stated in his offer, it would be no justification.

The court sustained the objection, and the testimony offered was excluded; to which decision the defendant's counsel excepted.

The jury found the defendant guilty, under the instructions of the court, and a bill of exceptions having been filed the cause was brought up by *certiorari*.

T. Frothingham, for the defendant.

I. The defendant had a right to arrest Connors, without warrant, if a felony at common law had previously been committed by him. Any private person who is present when a felony is committed is bound by law to arrest the felon, under pain of fine and imprisonment if he escape through his negligence. (2 *Hawk. P. C.*, 74.) There are other cases in which, though the law does not enjoin an arrest, yet it permits it. Thus, upon probable suspicion a private person may, if a felony has actually been committed by some one, arrest or direct a peace officer to arrest the party whom he supposes to be guilty. (1 *Chitty Cr. L.*, 15, 16; 1 *Hale*, 588, 589; *Barb. Cr. L.*, 477, 478, and cases

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there cited.) And if it can be proved that a felony had been committed by some one, and there was a reasonable and probable ground for suspicion, he will not be liable to an action, though it be afterwards proved that the party imprisoned was innocent. (4 *Taunt.*, 34; 5 *Price*, 525.) As the object of the rule is the prevention and punishment of crime, it is immaterial whether the thief be arrested in the act, or subsequently. Public policy would not allow, and the above authority denies, any such distinction. In this case defendant offered to prove that a petit larceny had actually been committed, and that Connors was actually guilty thereof. The whole question turns on the meaning of the word felony; if it includes the offence of petit larceny, then the proof offered should have been admitted, and the defendant acquitted thereon.

II. Petit larceny is felony at common law. (2 *Inst.*, 183; 4 *Bl. Com.*, 99.) Felony may be, without inflicting capital punishment, as in the cases instanced of self-murder, excusable homicide and petit larceny. Petit larceny is still a felony. The Revised Statutes have not reduced it to the grade of a misdemeanor. (*Ward v. The People*, 3 *Hill*, 396.) The provision of the Revised Statutes, declaring felonies petit larceny, defines statute felonies, but leaves those existing at common law untouched by the statute. In *Ward v. The People* (6 *Hill*, 144; *S. C. in Court of Errors*), the same doctrine was tacitly approved and affirmed, with the declaration that in petit larceny there can be no accessories, on account of the smallness of the felony. Judgment of Supreme Court affirmed. Another case in 5 *Hill*, does not interfere with the above doctrine; but the same judge, while reaffirming that petit larceny is felony, decides that in the section of the statute which removes the common law disqualification in all cases of conviction for "any offence other than a felony," the term felony, there used, only means that offence as declared and defined in the same act. (*Carpenter v. Nixon*, 5 *Hill*, 261.) The first marginal note in

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this case, in 5 *Hill*, is incorrect and is not what the case decides.

III. The difficulty with the County Court in this case was, that they were misled by that section of the statute (2 R. S., 886, § 34, 4th ed.) defining felony, as used in the statute, viz.: "The term 'felony,' when used in *this act*, or in any other statute, shall be construed to mean an offence for which the offender, on conviction, shall be liable by law to be punished by death or by imprisonment in a state prison." The legislature never intended to change the common law nature of this offence. The object of the definition appears to be entirely otherwise. It seems to me to be a definition used only to make plain the meaning of other enactments in the same statute when the word is used. And it does not follow that because in the same act they affix to petit larceny a lighter punishment than confinement in state prison, that therefore by reason of the supplementary definition, the offence ceases to be a felony at common law. The statute nowhere in words declares petit larceny to be no longer a felony; hence it must still remain a felony, only visited with a lighter penalty than under the common law.

E. A. Raymond (District Attorney), for the people.

I. A private person may arrest another while such other is engaged in the commission of a felony or breach of the peace. (*Barb. Cr. Law*, 549, 550, 2d ed.; 11 *John.*, 486; 3 *Wend.*, 350; 1 *Chitty Cr. Law*, 16, 17, 18.) But a private person is not permitted to arrest, after an affray or other misdemeanor has been committed, and before indictment found. It has been held that a constable is not justified in making an arrest, under these circumstances, without a warrant. (1 *Chitty Cr. Law*, 23; *Rosc. Cr. Ev.*, 614; *Fox v. Gaunt*, 3 *Barn. & Adolph.*, 798; *Barb. Cr. Law*, 550.)

II. This permission thus extended to a private individual is limited to cases of felony, and affrays while taking place.

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1. In this case, the crime with which the complainant, Connors was charged, was petit larceny, which is a misdemeanor. (2 R. S., 701, § 23; *Carpenter v. Nixon*, 5 Hill, 260.) 2. The defendant seized Connors several days after the commission of the said larceny. 3. The law gives to the private person a bare permission to arrest, after the commission of a felony. The circumstances should therefore be taken most strongly against him who seeks justification by them.

By the Court, T. R. STRONG, J. A private person is permitted by law, without warrant, to arrest and take before a magistrate one who has committed a felony. (1 *Chitty Cr. L.*, 15, 16; 1 *Hale P. C.*, 587, 588; *Barb. Cr. L.*, 550; *Holley v. Mix*, 3 *Wend.*, 350; 2 *Hawk. P. C.*, 118-120); but for mere misdemeanors, after their commission, an arrest can only be made upon a warrant from a magistrate. (2 *Hawk. P. C.*, 121, 122; *Philips v. Trull*, 11 *Johns.*, 486; *Barb. Cr. L.* 551.)

By the common law the crime of petit larceny is a felony. (1 *Hale P. C.*, 530; 1 *Hawk. P. C.*, 146.) It was supposed by the court below that the Revised Statutes have reduced the offence to a misdemeanor. There are only two provisions of the Statutes which have a bearing on the question. By 2 R. S. (p. 690, § 1), it is declared "that every person who shall be convicted of stealing, taking and carrying away the personal property of another, of the value of twenty-five dollars or under, shall be adjudged guilty of petit larceny." Section thirty (p. 702) provides that "the term felony, when used in this act or in any other statute, shall be construed to mean an offence for which the offender, on conviction, shall be liable by law to be punished by death or by imprisonment in a state prison." It will be observed that the definition of the latter section applies only when the word is used in a statute; and that the former section does not use the word, and is silent as to the grade of petit larceny. The common

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law rule, that petit larceny is a felony, therefore, appears to be untouched, and to remain in force in respect to all questions controlled solely by the common law. (*Ward v. The People*, 3 *Hill*, 395; *Carpenter v. Nixon*, 5 *id.*, 260; *Ward v. The People*, 6 *id.*, 144.)

It follows, that the evidence offered, that Connors had committed petit larceny, and that the alleged assault and battery by the defendant consisted in arresting Connors therefor without process and delivering him to a public officer, should have been received, and would have constituted a complete defence to the indictment.

It is unnecessary to consider whether the declaring, by statute, the offence of petit larceny to be less than felony, would, without anything more, abrogate the rule of the common law as to the right of a private person, without warrant, to arrest for that crime.

Conviction reversed and proceedings remitted for a new trial.

COURT OF APPEALS. Albany, March, 1855. Before *Gardiner*, Chief Judge, and *Denio*, *Johnson*, *Ruggles*, *Dean*, *Hand*, *Crippen* and *Marvin*, Judges.

THE PEOPLE, plaintiffs in error, v. JOHN W. THOMS, defendant in error.

On the trial of a person charged with having in his possession an altered and forged bank-bill, with intent to pass the same as true, it is ~~not~~ competent for the prosecution to prove that, on searching the prisoner's wife, immediately after his arrest, there were found in her pockets parts of bank-bills, apparently cut for the purpose of making similar alterations, there being no evidence of any concert between the prisoner and his wife, or that they were mutually engaged in altering bank-bills, or that either of them had any knowledge of the facts proved against the other; and where such evidence had been received, and the prisoner was convicted, the judgment was reversed.

Where, on the arrest of a prisoner, he made confessions to the officer, admitting his guilt, the officer having made no promises and no threats, such confessions were held competent evidence, although it appeared that the prisoner was very much frightened, and seemed much terrified at the time they were made, and although the statements of the prisoner were made partly in English and partly in German, and the witness called to prove the confessions did not understand what was said in German. By *Dean*, J.

Form of a writ of error, sued out in behalf of the people, to remove a criminal case from the Supreme Court to the Court of Appeals.

Form of an indictment for having in possession an altered and forged bank-bill, with intent to pass the same, the bill purporting to have been issued by a bank in another state.

THIS cause came before the court on a writ of error, sued out in behalf of the people, in the following form :

The People of the State of New-York, to the Justices of [L. s.] the Supreme Court for the First Judicial District, Greeting:

Because in the record and proceedings, and also in the giving of judgment upon a certain writ of error in your court, before you, brought from the Court of the General Sessions of the Peace in and for the city and county of New-York, between the said people and John W. Thoms, in a

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plea that the said John W. Thoms had committed the crime of forgery, whereupon a new trial hath been ordered by your said court upon the conviction of the said John W. Thoms, manifest error hath intervened, as is said, to the great damage of the said people, as complained, and we being willing that the error, if any, should be corrected, and full and speedy justice done in the premises in this behalf, do command you, that if judgment be thereupon given, then, and without delay, you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching or in any wise concerning the same, to our judges of the Court of Appeals, within twenty days after serving of this writ, together with this writ, that the record and proceedings aforesaid being inspected by our said judges, they may cause to be done thereupon, for correcting that error, what of right ought to be done.

Witness, Addison Gardiner, one of the judges of the Court of Appeals of the State of New-York, at the city of Albany, this twenty-fourth day of January, in the year one thousand eight hundred and fifty-four.

B. F. HARWOOD,

N. BOWDITCH BLUNT,

Clerk Court of Appeals.

District Attorney.

It appeared by the return that the prisoner had been indicted for forgery. The indictment was in the following form :

City and County of New-York, ss :

The jurors of the people of the State of New-York, in and for the body of the city and county of New-York, upon their oath, present : That John W. Thoms, late of the first ward of the city of New-York, in the county of New-York, aforesaid, otherwise called Johan W. Thoms, on the seventeenth day of December, in the year of our Lord one thousand eight hundred and fifty-two, with force and arms, at

the ward, city and county aforesaid, feloniously had in his custody and possession, and did receive from some person or persons to the jurors aforesaid unknown, a certain false, forged, altered and counterfeited negotiable promissory note for the payment of money, commonly called a bank-note, purporting to have been issued by a certain corporation or company, called the Southport Bank, duly authorized for that purpose by the laws of the State of Connecticut, which said last mentioned false, forged, altered and counterfeited negotiable promissory note for the payment of money was theretofore altered from a valid note of the same bank, for the payment of and of the denomination of one dollar, and which altered note is as follows :

"The Southport Bank will pay "FIV" E dollar to the Bearer, on demand.

I. ALVORD, *Pres't.*

"F. D. PERRY, *Cash.*"

with intention to utter and pass the same as true, and to permit, cause and procure the same to be so uttered and passed, with the intent to injure and defraud divers persons to the jurors aforesaid unknown, he the said John W. Thoms, then and there well knowing the said last mentioned false, forged, altered and counterfeited promissory note, for the payment of money, to be false, forged, altered and counterfeited as aforesaid, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York, and their dignity.

N. BOWDITCH BLUNT,
District Attorney.

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The prisoner pleaded not guilty, and was tried in the Court of General Sessions of the Peace, in and for the city and county of New-York, on the 10th of March, 1853, before Welcome R. Beebe, City Judge, and two of the aldermen of said city, judges of said court, with a jury.

The District Attorney called *William Clark*, who testified: I am an exchange broker, corner of Duane and Chatham streets. The bank-bill now shown to me (the same described in the indictment) is a valid one dollar bill on the bank it purports to be of; and has been altered to a five, by pasting a figure "5" over the figure "1," and putting the letters "Fiv" over the place left by cutting out the letters "On" in the body of the bill.

Upon his *cross-examination* the witness testified that he knew it to be a valid one dollar bill, from having received such, and seen the genuine plates. Did not know the names of the president or cashier of the Southport Bank, and had never seen either of them write.

Thomas Barton testified: I am a police officer of the eleventh ward; I arrested the defendant on the 17th of December, 1852, at his grocery store, on the corner of Goerck and Delancy streets; I did not tell him why I arrested him; I called him out of the store and conducted him thirty or forty yards from his store, and put him in charge of officer Sutton; I then went to his dwelling, next door to his grocery, and made a search there, but found nothing. His wife was there; I did not tell her he was in custody; I then proceeded to the station-house where the prisoner had been taken, having left officer Robb at his house; I searched the prisoner at the station-house, and found nothing upon him at that time; after that Mr. Robb came in with prisoner's wife; Thoms was not present; one did not know that the other was there; I then searched the prisoner again, and found one five dollar bill altered

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from one (the same set out in the indictment), in his cap, on the outside, between the lapel and body of his cap.

The District Attorney then asked the witness what statements were made by the prisoner; upon which the counsel for the defendant claimed the right to examine the witness as to the circumstances under which such statements (if any) were made, which being accorded, the witness testified as follows :

The prisoner appeared to be very much frightened; he cried and threw his arms around my neck. He seemed very much terrified. I cannot tell that he understood what he said; he spoke partly in English and partly in German. I could not understand what he said in German.

In answer to the District Attorney, the witness continued : I made no promises, and used no threats. I said nothing to him on the subject before he cried. There was nothing in my manner to frighten him before he cried and threw his arms around my neck.

The District Attorney then proposed to give in evidence the statements or confessions of the prisoner, to which the counsel for the prisoner objected, upon the ground :

First. That confessions made while the accused was under the state of mind and terror described by witness were inadmissible; and Secondly. That as the statements were made partly in a language not understood by witness, they should be excluded; the rule being, that *all* the statements should be given in evidence, and what was said by prisoner in the German language might have qualified or explained that which he said in English.

The court ruled that the confession was admissible; to which ruling the counsel for the defendant excepted.

The witness then testified : I asked him where he had got the bill which I found in his cap; he said it was one he had fixed that day. I then asked him if he had any more; he said no. At that moment, officer Sutton handed me a roll of bills, which he stated he had picked up from the

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station-house floor. I asked the prisoner if they were his; he said they were; that he had dropped them out of his sleeve. I then locked him up until the next morning.

The District Attorney then offered five notes, all of different banks, and of the denomination of five dollars, four of which were genuine. One had the figure five in the margin cut out. Three of them had the letters "Fiv" cut out of the body of the bill. One of them was admitted to be a genuine one, altered into a five.

The counsel for the defendant objected to their admissibility, upon the ground that they were different in character from the note set out in the indictment. Objection overruled, and exception taken.

The witness continued: He said he did not think he had passed over three in a week, perhaps not more than one. Next morning, going from station-house to the police office, the defendant said, "it was a great trouble for so little money."

The bills were then put in evidence.

Alexander Robb testified: I am police officer of eleventh ward; met defendant's wife in the street, coming from the house; she asked where her husband was; I told her she had better go to the station-house, but did not tell her he had been arrested.

Mr. Barton being recalled, the District Attorney offered to prove that he searched the wife of the prisoner at the station-house, and the result of the search.

To which the defendant's counsel objected, upon the ground that such search was made while the prisoner was not present, and he could not be held criminally responsible under this indictment for anything which might have been found in possession of his wife.

The court overruled the objection, to which ruling the defendant's counsel excepted. The witness continued: "I searched the defendant's wife, and found in her possession the handkerchief now produced, having a large number of

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the ends of figures in the margin, cut from bank-bills, now shown. (The handkerchief and contents were produced, and exhibited to the jury.) The prisoner said she was his wife.

Being *cross-examined*, the witness testified: Mrs. Thoma took this stuff out of her pockets; the defendant was not present; she said she had picked it up from the floor in her house.

The prosecution here rested, and, after evidence had been introduced in behalf of the prisoners,

Judge Beebe charged, substantially, as follows: After briefly recapitulating the facts, he instructed the jury that the confessions of the prisoner, not having been obtained by promise or threats, were evidence properly submitted to their consideration; that the possession of the notes from which words and figures had been cut, and another altered note, as well as the figures and words cut from bank-notes found in the defendant's possession, was evidence from which the jury might infer that the prisoner had the note, upon which the indictment was founded, in his possession with an intent to pass it as true, for the purpose of fraud.

The counsel for the prisoner excepted to the charge, and requested the court to charge upon the following propositions:

First. That the indictment avers that the "Southport Bank" was duly authorized by the laws of the State of Connecticut; it is a material fact in the case, and must be proved.

Upon this point, the court charged: That it is a material fact, but it need not be proved by the introduction of the charter; that proof of such bills being in circulation in the community was sufficient evidence that such an institution was in existence, and authorized by the laws of the State of Connecticut. To which the counsel for the defendant excepted.

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Second. That the confessions of the accused, made under great fear and agitation, partly in a language not understood by the witness, are not admissible upon the trial of the accused.

The court refused so to charge, but charged: That the law, as established, is, that if a crime is voluntarily confessed, without promise or threats, the confession is admissible. To which refusal and charge the counsel for the defendant excepted.

Third. That admissions made to the officer who apprehended the defendant, and before he had been brought before the magistrate, and before the defendant had been fully apprised of his rights, are not admissible in evidence.

The court refused to charge upon this point otherwise than they had already charged. To which refusal the counsel for the accused excepted.

Fourth. That if even the prisoner had the bill in his possession, knowing it to have been altered, he cannot be found guilty, under this indictment, unless there is evidence satisfying the jury that he had been guilty of some overt act, showing conclusively that he intended to utter it as true and genuine.

The court refused to charge upon this point otherwise than they had already charged. To which refusal the counsel for the defendant excepted.

The jury found the prisoner guilty. The cause having been brought before the Supreme Court, on a writ of error issued in behalf of the prisoner, the judgment of the Sessions was reversed, but no reasons were assigned by the Supreme Court for such reversal. The case was then brought before the Court of Appeals, by the District Attorney, on a writ of error.

A. Oakley Hall (District Attorney) for the people.

I. The confessions were correctly admitted by the court, and the charge regarding them was proper. 1. A confes-

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sion made in great agitation, but without threats or promises, was admitted. (*State v. Crank*, 2 *Bailey*, 66, note to *Rosc.*, 41.) (1.) In *Thornton's case* (*Joy on Conf.*, 13; 1 *Moody Cr. C. R.*, 27), wherein a constable interrogated "in a manner calculated to intimidate" (the words of *Bayley*, J., who tried the case), but held out no promise or threat, the confession was held admissible.

II. The second ground of objection to admission of the confessions is contrary to the evidence. 1. All the confessions were given. 2. The law in regard to giving an entire confession contemplates a specific shutting out of part of a confession. 3. That the prisoner spoke partly in German, and that the witness did not understand German, is his misfortune. Suppose part of a prisoner's statements are incoherent, or "gibberish:" will this part, because necessarily not understood and not given, invalidate confessions, when all that can be understood are given in evidence? (1.) "The rule does not exclude a confession, where only a part of what the defendant said has been overheard." (*State v. Covington*, 2 *Bailey*, 569; note to *Rosc.*, 55.)

III. The notes were admissible to show motive or *scienter*, as stated in judge's charge. 1. They were not different in character from the note averred in the indictment. (1.) The indictment was for having in possession a five dollar altered note. Every one of the admitted bills was of this character, to wit, a five, altered from something else. (2.) The first note (figure 5 cut out of margin) may have been the one from which came the numeral five that was employed in altering the bill averred in the indictment. It was fair argument, to this effect, to the jury. (3.) Notes 2, 3 and 4 showed how the note averred in the indictment was probably altered by cutting out "fiv" to paste over "on." (4.) The fifth note was admitted to be a genuine one altered into a five, as was the one alleged in the indictment. (*Rex v. Taverner*, in note to *Rex v. Smith*, 4 *Carr. and Payne*, 411; 19 *Eng. Com. L. R.*, 449, *Phil. ed.*) (5.) There is a

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distinction to be taken between *scienter* upon passing, and upon possession with intent to pass. (*Rosc. Cr. Ev.*, 92, 93; *Arch.*, 127.)

IV. There was concert proven between husband and wife; and evidence of what was found upon the latter, on the search objected to, was binding upon the former. 1. She was proven to have just come from his house, inquiring for him. 2. Her acts, and indeed the acts of any stranger coming from his house, under the circumstances of the arrest, would be binding, however objectionable her declarations might have been. 3. If there was anything in this objection, the testimony for defence connected the property found upon the wife directly with the possession of the prisoner. 4. The bundle, as found in the prisoner's house, was evidence against him.

V. The exception to charge, as to proof of the existence of the bank, is untenable. (*People v. Davis*, 21 *Wend.*, 309; *People v. Peabody*, 25 *id.*, 472.)

VI. There exists no distinction regarding admissions made before or after judicial examination. The only qualification is when the party is being examined; nothing which he then says is admissible, except that reduced to writing; this is by statute. 1. This kind of admission (to wit, confessions not made before a magistrate) was recognized in *People v. Hennessy* (15 *Wend.*, 147.)

VII. Intent is a pure question for the jury. Unexplained possession of forged paper, &c., has always been legitimate matter from which to presume guilty intent.

Jonas B. Phillips, for the defendant in error.

L. The court erred in admitting the evidence of the prisoner's confession. First. Because it was proved that the prisoner was very much terrified; that the witness could not tell that he understood all that he said; and that he spoke

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partly in English and partly in German, a language not understood by the witness by whom the prosecution sought to prove the confession; Secondly. The confession was not voluntary; and the court did not exercise that degree of caution which should always regulate the admission of verbal confessions. (1 *Greenl.*, § 214; *Arch.*, 109; *Whart. Am. Cr. L.*, 185.) The value of confessions depends upon the supposition that they are deliberate and voluntary. (*Id.*, §§ 215, 219.) It matters not whether the terror or fear which operates upon the mind of the accused is produced by direct threats, or by the suddenness of his arrest, the fear of punishment, the dread of exposure, or any other cause tending to deprive him in any degree of his reason or throw him off his guard.

II. The second ground of objection to the admissibility of the confession is in strict accordance with the evidence. The prisoner is a German; he spoke partly in his native language, which was not understood by the witness, and partly in English. No rule is better established than that the whole of what a prisoner said should be taken together. (1 *Greenl.*, § 218; *Joy on Conf.*; *Arch.*, 114, a; *Whart. Am. Cr. L.*, 188; *Rosc. Cr. Ev.*, 55.)

III. The court erred in admitting the evidence as to what was found on the person of the prisoner's wife, when she was searched at the station-house, the prisoner not being present at the time. There was no evidence of any concert of action between them, in reference to the charge contained in the indictment, to render him responsible for her act or declarations.

IV. There was no evidence of the existence of such a bank as the Southport Bank of Connecticut. The cases of *The People v. Davis* (21 *Wend.*, 309) and *Same v. Peabody* (25 *id.*, 472) do not sustain a contrary position. It was not contended on the trial that the fact should be established by the production of the charter; but it was averred, as it is

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now, that there was no evidence whatever of the existence of such an institution.

V. Admissions made to officers by prisoners, before they are taken before a magistrate, should be excluded. The duty of an officer is to take the prisoner before a magistrate for examination; the law makes this imperative. It is for the protection of the accused; and he is deprived of all its benefits, if, before being taken before the proper officer, whose duty it is to caution him and apprise him of his rights, an artful and ingenious police officer extorts from him admissions, or entraps him into making a confession, even if he uses neither threats nor promises. (2 R. S., 590, *et seq.*, 2d ed.)

VI. Intent is undoubtedly a question for the jury; but that which is legal evidence, from which a jury have the right to infer a guilty intent, is a question for the court. The mere possession of a counterfeit or altered note is not sufficient; and the court erred in refusing to instruct the jury that the prisoner could not be found guilty under this indictment, unless there was evidence of some overt act showing such guilty intent.

DEAN, J. The prisoner was indicted in New-York for having in his possession an altered bill of the Bank of Southport, in Connecticut, with intent to pass the same. The alteration consisted in pasting a figure 5 over the figure 1 in the genuine bill, and the letters "Fiv" over the letters "On." I cannot see that there was any error in the charge of the judge, in reference to the possession of the bill by the prisoner with intent to pass it as genuine. It was a question of fact for them, nor can I entertain a doubt but what their verdict was fully warranted by the evidence. Indeed, any other verdict on the testimony would have been an outrage alike to common sense and criminal jurisprudence. Whether all the evidence was admissible, is another question, which I propose to consider. The Supreme Court

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reversed the conviction, but upon what ground does not appear.

The first exception taken was to the admissibility of the confessions of the prisoner, made to a police officer at the time of arrest, and when the altered bill, on search, had been found secreted in his cap.

The principle upon which declarations of parties in a civil action or criminal prosecution, made against their interest or innocence, are admitted in evidence, is one so manifestly correct that no judicial system rejects them. The foundation of this species of evidence is the innate selfishness of man's nature. Hence, all declarations made when the declarant is induced to speak from threats of punishment or offers of impunity are rejected, because it is known, so great is this desire of self-preservation, that men to secure it will often tell what is not true, even against their own innocence, if it but contributes to their safety. Subject to this exception, an admission, by and against the interest of the party to be affected by it, is always to be regarded as evidence, and the weight to be given to it must depend upon the character of the admission and the manner in which it is preserved and given to the court or jury. If in writing, and consequently the whole can be used precisely as made, there can be no evidence entitled to more consideration. If verbal, then the weight to be attached to the particular declarations proved must depend upon a variety of circumstances, all of which should be regarded by the tribunal to which the evidence is addressed. The intelligence of the person making the admission, the intelligence of the witness who heard and narrates it, his integrity and freedom from prejudice (for it is manifest that the suppression of a word, intentional or not, often affects so seriously the sentence as to reverse its entire meaning), the circumstances under which the admissions are made, the freedom from constraint of any kind; these and numerous other considerations, which will suggest them-

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selves to the mind, affect the weight to be given to the evidence, but not its admissibility.

In the case at bar the prisoner appeared very much frightened; he spoke partly in English and partly in German; the witness could not understand the German, but the officer used no threats and made no promises. The prisoner's counsel claims that confessions made under these circumstances were inadmissible, in consequence of the prisoner's state of mind, and also because the officer could not understand the German. The fear was evidently produced by the arrest and discovery of the altered bills, and not by any threats of the officer. It has never been held that confessions thus made were not admissible; on the contrary, such confessions, before the party has had an opportunity to confer with any one, and while acting under the direct influence of the remorse which always follows detection, are likeliest to be true. If the witness had said that a part of the same admission was in German and a part in English, I think the evidence would have been inadmissible. But it appears the admissions were at the police office, after the prisoner had been searched and the bills found; it does not appear that any portion of the admissions were in German. The general rule being that confessions are admissible, the onus was upon the prisoner's counsel to show that the witness could not give the whole. The answers appear to be full and explicit to the questions put. At best, it was only to be used against the conclusiveness of the confessions, and not to their admissibility. Nor is there any force in the objection that they were made prior to the time that the prisoner was taken before the examining magistrate. (1 *Greenl.*, § 215.)

The next exception is to the admission in evidence of the fact that the prisoner's wife was searched and the result of the search. The wife was arrested at about the same time with the prisoner, but a few minutes intervening; she was arrested while coming from his dwelling-house and before she knew of the husband's arrest; I cannot see that there is

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anything in this objection. The house of the prisoner or his store might have been searched; any person in the house and who had been associated with the husband might have been searched; and if anything had been found upon the person or in the house, which was connected with the bills found upon the prisoner, it would have been evidence for the consideration of the jury; much more does this reasoning apply to the wife, who is cohabiting with the husband, and who is, in fact as in law, *sub potestate viri*. I think the conviction was right and that the judgment of the Supreme Court should be reversed.

DENIO, J. The fact that the prisoner had the altered note in his possession was fully proved; and the only question was as to his knowledge of its character, and his intention respecting it. The prosecution affirmed that he possessed it with the intent to pass it as true. If he was concerned in altering it from a lower denomination, and especially if he carried on to any extent the business of detaching the numerals from genuine bills and affixing them to the notes of a lower denomination, it would naturally be presumed that he had some object in doing so, and none which could be suggested would be so probable as that he intended to pass off the notes, thus raised to a higher apparent value, as genuine notes of the value which they were made to assume; and this would go very far to show that he intended to pass the note which was found on him, which had been dealt with in the same way. Very strong evidence to show him engaged in this unlawful practice was given, independently of that which arose out of the search of the person of his wife; but the prosecution was not content to rest the case upon that evidence, but persisted, against the previous objection, in showing that she had in her possession engraved figures, cut from genuine bills, suited to the commission of this species of forgery. If this evidence was incompetent, the Supreme Court was right in reversing the judgment, whatever may

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be thought of the strength of the case against the prisoner upon the other evidence.

There was no other evidence of any concert between the prisoner and his wife, or that they were mutually engaged in altering bank bills, or that either of them had any knowledge of the facts which were proved against the other. Where two persons sustaining the relation of husband and wife are each found doing acts indicating criminal designs of the same nature, there are strong reasons for conjecturing that they are conspiring together; but it is mere conjecture, and not evidence, even the lamest guide of the fact. Now, the possession by the wife of these fragments of notes was enough legally to fix upon her the suspicion of criminal intention; but the presumption would not attach to the husband, unless we shall first suspect that, from their domestic relation, one of them (and especially the female) would not engage in such an enterprise without the coöperation of the other. But such a suspicion, though natural enough, is quite too vague to be made the foundation of a criminal judgment. If this evidence should be held competent, I do not see but that the criminal conduct of the wife, in any matter which admitted of the participation of another, might always be given in evidence against the husband, upon the presumption of concurrence growing out of the conjugal relation. The evidence was clearly incompetent, and, without examining the other exceptions, we must hold that the judgment was erroneous, and that it was rightly reversed by the Supreme Court.

The judgment of the Supreme Court should be affirmed.

A majority of the judges concurring in the opinion of Judge Denio, the judgment of the Supreme Court was affirmed.

SUPREME COURT. Albany General Term, May, 1857. *W. B. Wright, Harris and Gould, Justices.*

FRANCIS McCANN, plaintiff in error, *vs.* THE PEOPLE, defendants in error.

Since the adoption of the Revised Statutes, a party who has brought a writ of error to reverse a judgment in a criminal case cannot allege diminution and sue out a *certiorari*, but the cause must be decided upon the return to the writ of error, which return properly includes the pleadings, the bill of exceptions, if any, and the judgment; and when, on alleging diminution, a *certiorari* had been issued and return thereto had been made, the *certiorari* and return were struck out on motion.

Any irregularity, which cannot be made to appear in the return to the writ of error, can be made available on motion, in the court below, either to quash the indictment, or for a new trial or for other appropriate relief, according to the circumstances of the case.

Thus, if an error or irregularity has occurred in summoning or impanneling the petit jury, unless the defendant can present the objection in the form of an exception to some decision upon the trial, he must bring it before the court on a motion for a new trial. He cannot make it the ground of reversing the judgment upon writ of error.

The statute requiring the District Attorney to issue a precept to the Sheriff, at least twenty days before the holding of a court of oyer and terminer, if it is at all applicable to the stated terms of such courts held under the Code, is merely directory, and an omission to issue it, inasmuch as it does not "tend to the prejudice of the defendant," will not invalidate the subsequent proceedings or judgment.

When, on the trial of a prisoner for the murder of his wife, the homicide was shown to have taken place on the 8th day of July, 1856, evidence on the part of the prosecution, given by a witness who had resided next door to the prisoner from the autumn of 1855 till the last week of May, 1856, showing that during all that time the prisoner had frequently had difficulty and quarreled with his wife, was held to be admissible, as showing an alienation of affection, and as authorizing an inference, in the absence of other evidence, that the same state of feeling continued to exist after the witness ceased to have an opportunity of observing it.

Held, also, that upon the question of motive, it was competent for the prosecution to prove that in November, 1855, the deceased made a complaint against the defendant for assault and battery, upon which he was arrested and an examination was had, and the defendant was held to bail.

The prosecution was also permitted to prove that the deceased had deposited money in the savings bank in the fall of 1855, and again in June, 1856, and that a bank-book was issued to her in her own name and left with

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her sister at Newburgh, and that the defendant complained that he had no money, and that his wife had taken the money and put it in bank, and that she had the bank-book, on the ground that such evidence tended to show both the existence and the source of the ill feeling of the defendant towards his wife.

Where a physician, who had heard all the evidence, and who saw and examined the defendant on the ninth day of July, two days after the homicide, had testified that the prisoner was then deranged, and that he thought *delirium tremens* was the cause of his insanity, and the court had not permitted the witness to answer whether, in his opinion, founded on such personal examination, the same state of mind had existed on the night of the seventh of July, or what was the state of the defendant's mind on the night of the seventh of July, but had permitted the witness to state how long he thought the defendant, when he saw him, had been in such a state of *delirium tremens*, it was held that no error had been committed.

Where the counsel for the defendant asked a medical witness, who had heard all the evidence, what, in his opinion, the facts stated by the witnesses on the trial, supposing them to be true, showed as to the state of the defendant's mind on the night of the seventh of July, when the homicide took place, and the evidence was excluded by the court, but at the same time the court decided that the witness might be asked his opinion upon a hypothetical case corresponding to the testimony, or that the testimony might be read to the witness and his opinion asked upon it, on the supposition that those facts were true, it was held that, inasmuch as the question permitted to be asked was substantially, in its effect and scope, like the one which had been excluded, no error had been committed. *Per* HARRIS, J.

What is the proper mode of examining a medical witness on a question of insanity, stated by HARRIS, J.

Where the presiding judge had charged the jury that the defence of insanity must be proved beyond a reasonable doubt, and if the defendant had satisfied them beyond a reasonable doubt, so that they should find that at the time of killing he was so far really insane as not to be responsible for the act, they should acquit him, but otherwise they must convict him, the charge was held not to be erroneous. (a)

Section three of chapter three hundred and thirty-seven of the laws of 1855, which authorizes an appellate court, on a writ of error from a court of Oyer and Terminer, to order a new trial, if it shall be satisfied that the verdict was against evidence, or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below, is inoperative and void, for the reason that it is in conflict with the sixteenth section of the third article of the constitution of this state, which declares that no local bill shall embrace more than one subject, and that that shall be expressed in the title. (a)

(a) On both these propositions the Court of Appeals differed from the Supreme Court, and reversed the judgment. (2 *Smith*, 58.)

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ERROR to the Albany Oyer and Terminer. The defendant had been indicted for the murder of his wife, and, upon being arraigned, had pleaded not guilty to the indictment. The issue was tried at the Albany Oyer and Terminer, in November, 1856, before Mr. Justice Gould and the associate justices.

On the trial, the killing of the deceased by the prisoner, on the morning of the 8th day of July, 1856, was not controverted, but the defence rested entirely on the ground that the prisoner was in a state of insanity at the time the homicide was committed.

Many witnesses were sworn and examined on the part of the people, but their evidence is not relevant to the exceptions taken.

It was proved that the deceased was seen alive on the evening of July 7th, 1856, and the next morning was found dead in the house occupied by her and the prisoner, with eight wounds upon her head, four of which were mortal. An axe and hatchet were found in the same room covered with blood.

Jane Mitchell, a witness sworn and examined on the part of the prosecution, before the people rested their case, testified as follows: I lived next door to the prisoner when he lived in John-street; he moved from that street to the place where the deceased died, the last week in May, 1856; I moved from that street last week in April, 1856.

The District Attorney then offered to prove by this witness that the prisoner had difficulty with his wife when he lived in John-street. This evidence was objected to by the counsel for the prisoner, on the ground that it was too remote, and was immaterial. The court overruled the objection, and the prisoner's counsel excepted.

Witness testified that the deceased, in the fall of 1855, came to the house of the witness; it was a very cold Saturday night; the prisoner came in after, at twelve o'clock at night, and began to jaw and scold and abuse her; he called

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her a whore, threatened to take us up for keeping her; she went after a policeman to have him taken; she came back and stayed all night; the next Monday she made complaint against him; I heard jawing all the next day between them in their room; heard them jawing and quarreling every week after; prisoner talked the most.

S. H. H. Parsons, a witness sworn and examined for the people, before the prosecution rested their case, testified as follows: I am one of the police justices of the city of Albany.

The District Attorney offered to prove by this witness that a complaint was made before him against the prisoner, by the deceased, in November, 1855, for an assault and battery. This evidence was objected to by the counsel for the prisoner, as being too remote, and otherwise improper and irrelevant. The objection was overruled by the court, and the counsel for the prisoner excepted.

Witness testified that Agnes McCann made a complaint against the prisoner for assault and battery, on the 26th day of November, 1855, upon which the prisoner was arrested and an examination was had; the prisoner was held to bail.

The last answer was objected to by the counsel for the prisoner, as being improper and irrelevant, but the objection was overruled by the court. To which decision the counsel for the prisoner excepted.

After the people rested their case, the counsel for the prisoner called and examined several witnesses upon matters not relevant to the exceptions taken.

Before the people rested their case, the District Attorney offered to prove that the deceased had deposited in her own name, in a savings bank at Newburgh, \$250 in money, which was known to the prisoner, and which prisoner complained of.

This evidence was objected to by the counsel for the prisoner, as being improper and irrelevant, but the court decided that it was competent evidence to prove motive on the part of the prisoner, as well as difficulty between them.

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to which decision the counsel for the prisoner then and there duly excepted.

It was thereafter proved that the deceased had deposited at one time, in the fall of 1855, \$100, and in June, 1856, \$150, in the said bank, to her own credit, and the bank-book therefor was issued in her own name; that the deceased left the bank-book with her sister in Newburgh; that the prisoner complained that he had no money; that what money there was his wife had taken to Newburgh and put in the bank, and she had the bank-book.

Dr. Barent P. Staats, a witness called, sworn and examined on the part of the prisoner, testified as follows: I am a physician and surgeon, and have practiced as such thirty-eight or thirty-nine years; I saw the prisoner at the station-house the evening of his arrest, July 9th, 1856; I conversed with and examined the prisoner at that time; I went into the place where the cell was; I have attended more than one hundred cases of *delirium tremens* within six years, in my own practice, at the alms-house and penitentiary; at the time I saw the prisoner at the station-house, I think he was deranged; I think it was *delirium tremens*, produced by previous drinking; I knew his habits of drinking; I supposed drinking was the cause of his insanity; I am not certain as to the cause; I have been present in court since the commencement of this trial, and have heard all the evidence given on both sides.

Question by prisoner's counsel. What, in your opinion, was the state of the prisoner's mind on the night of the 7th of July, 1856?

The question was objected to by the district attorney, and the objection sustained by the court; to which decision the counsel for the prisoner excepted.

Question by the counsel for the prisoner. What, in your opinion, founded on your personal examination of the prisoner on the night of the 9th of July, 1856, was the state

of the prisoner's mind on the night of the seventh of July preceding?

Objected to by the district attorney.

The court ruled that in this shape it called but for conjecture and could not be asked, but that the question might be asked, how long the witness thinks the prisoner had then (when he saw him) been in the state of *delirium tremens*; to which decision the prisoner's counsel excepted.

Question by counsel for the prisoner. What, in your opinion, do the facts stated by the witnesses on the trial, supposing them to be true, show as to the state of the prisoner's mind on the night of July 7th, 1856, the time his wife was killed?

Objected to by the district attorney, and the court ruled, that it seemed impossible to ask this question without allowing the witness to answer, in fact, on his own impression of the truth of the evidence. The court permitted the counsel to ask his opinion on a hypothetical case, corresponding to the testimony, or by reading to him the testimony and asking him, on the supposition that those facts are true, and so excluded the question; to which decision the counsel for the prisoner then and there excepted.

The prisoner's counsel then put the following question to the witness:

Question: Suppose the case of a man who was accustomed to the excessive use of spirituous liquors, and had been a considerable period of time; he possessing a nervous and excitable temperament; he has had difficulties with his wife; and is seen at times running away as if to escape from officers, saying they are after him when they are not; he is frequently heard falsely accusing his wife of intimacy with other men, and with being drunk, and a drunken woman; he and his wife are about to separate by mutual consent; on the third of July, and for several days after he drinks freely and to excess, of liquors which are in his house; on the fifth of July he is seen with eyes bloodshot; on the

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night of July seventh the prisoner is seen apparently sober with his face resting upon his hands, and buys a candle about nine o'clock at night; on the morning of July eighth he is seen coming from his house at six o'clock, and states to persons that he meets that he has had a hard night; that two or more men came to his house in the night-time and were with his wife; and that a fight ensued with axes, in which he killed one or more of the men, and that he also killed his wife; and that afterwards they came and carried away the persons killed; that he goes into the city among persons who knew him well, in his shirt sleeves, and remains until about half-past seven; he then borrows a penny of a boy, telling him not to mention the fact that he had seen him; he is proved to have in his possession, at six o'clock, four cents; he crosses the ferry to a neighboring village and is found concealed in a cellar on the afternoon of the ninth, and on being arrested, makes similar statements in regard to the transaction on the night of the seventh, and states that he has wounds on his person received in the fight, which statement is untrue. Prior to the alleged killing he is seen at times striking against a wall at some person supposed to be present, when there is no one to be struck; his wife is found on the morning of July eighth, dead, with wounds on her head (four of them mortal), which were occasioned by one or more axes, and in the same room are found an axe and a hatchet covered with blood; the axes plain to be found, although one is partly covered with a bundle:

What, in your opinion, do these facts show in regard to the state of the prisoner's mind at two or three o'clock on the night when the woman is supposed to have been killed? The court decided that the question might be asked.

Answer: I should think he was insane.

Alexander H. Hoff, a witness sworn and examined for the defence, testified that he was a physician, and had been in practice since 1845; that he had been in court since

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the commencement of the trial and had heard the whole evidence.

The same questions as were asked of Dr. Staats were asked of the witness, by prisoner's counsel, and the same rulings thereon were made by the court, and the same exceptions taken by the prisoner's counsel.

At the request of the prisoner's counsel the presiding judge charged the jury that, if they were satisfied from the evidence that at the time the alleged offence was committed, the prisoner, in consequence of partial insanity, was laboring under such defect of reason as not to be conscious of the nature, character and consequences of the act, or not to know that the act was wrong, he should be acquitted; that if by reason of *delirium tremens* he believed, when he committed the act, that he was defending himself in a supposed fight with men who were his enemies, such delusion would release him from criminal responsibility for the act committed under its influence; that, in determining the question of insanity, the jury may consider the previous intemperate habits of the prisoner, the circumstances connected with the commission of the alleged offence, so far as they are disclosed, the conduct and declarations of the prisoner before and after the offence was committed, and the opinion of the medical witnesses.

The presiding judge further charged the jury (among other things) that insanity, whether *delirium tremens* or any other species, might be proved in either of two ways, besides the direct proof of fact showing it to the jury: First (and most directly). By absolute opinions of medical men, founded on their own examination of the person and sworn to before the jury; Second. By proof (satisfactory to the jury) of facts such as are symptoms or characteristics of the disease, and then by competent medical opinions that those facts (if proved) show insanity.

The medical gentlemen, in the latter case, do not find the facts. That you must do, before their opinions become

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applicable to the case; when you have so found the facts those opinions become evidence; evidence, on the accuracy and weight of which, as of other testimony, you pass.

Guided by these rules, you will inquire, was the prisoner so insane (from any cause) that at the time of the killing he did not know the act he was doing to be wrong, and to assist you in this inquiry you will also inquire (and the evidence has been admitted for the very purpose of enabling you to inquire) was he from any cause insane, before or after the act, and if so, either before or after or both, was the insanity of so permanent or continuing a kind, that it extended to and existed at the time of killing? If you find it did so, you acquit.

∴ The fact of the killing is admitted; that the act was done by the prisoner is not disputed. Thus the issue is really reversed from the usual one. The question of his insanity is a matter of positive defence, and is a defence to be affirmatively proved, and a failure to prove it is (like the failure to prove any other fact) the misfortune of the party attempting to make the proof; and in this case, as in all cases of fact, you are not to presume what has not been proved, under the distinctions and upon the principles already given you. The act being plainly committed, and that the prisoner did it being undoubted, and the defence set up on his part, that he was insane, the burden of the proof is shifted. In the proof of the deed itself, if any reasonable doubt be left on your minds, the prisoner is to be acquitted. But as sanity is the natural state there is no presumption of insanity, and the defence must be proved beyond a reasonable doubt. If (canvassing the whole evidence on the legal principle laid down in the charge) the prisoner has satisfied you so far beyond a reasonable doubt that you find that he was, at the time of the killing, as far really insane as not to be responsible (under the distinctions stated to you) for this particular act, you acquit, otherwise you convict.

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The jury having found the defendant guilty, he was sentenced to be executed on the 23d of January, 1857. A bill of exceptions having been made by the defendant, a writ of error was allowed by the presiding justice, with a stay of proceedings upon the judgment.

The clerk having made his return to the writ of error, the defendant's attorney issued a writ of *certiorari*, directed to the judges of Oyer and Terminer, requiring them to certify "whether a *venire* or precept was issued by the district attorney of the county of Albany to the sheriff of the county of Albany, to summon the grand jurors by whom a certain indictment for the crime of murder was presented to our said court of Oyer and Terminer against Francis McCann, or whether such or any *venire* or precept was served by said sheriff for said grand jury, or whether any return of such *venire* or precept has ever been made by such sheriff, and also, whether a *venire* or precept was issued by the district attorney of the said county of Albany to the sheriff of the said county of Albany to summon the petit jurors from whom the jury was formed by which the said Francis McCann was tried and convicted, and whether such or any *venire* or precept was served by the said sheriff upon the said petit jurors or returned by him; or whether the petit jurors by whom the said Francis McCann was tried and convicted, or part of them, were drawn by the clerk and summoned by the sheriff of the county of Albany, in pursuance of an order of the court of Oyer and Terminer, directing the sheriff to summon sixty additional jurors to be drawn by the clerk in the usual way.

"To this writ the clerk made a return as follows: In obedience to the writ of *certiorari*, served upon me in the above entitled action, I do hereby make return thereto as follows:

"1. As to whether a *venire* or precept was issued by the District Attorney of the county of Albany to the sheriff of the county of Albany to summon the grand jury by whom

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a certain indictment for the crime of murder was presented to our court of Oyer and Terminer against Francis McCann, I return that I have no knowledge.

"2. As to whether such *venire* or precept was served by said sheriff upon said grand jurors, I return that I have no knowledge.

"As to whether any return to such *venire* or precept has been made by said sheriff, I return that I have examined the records and files in my office, and I find that no such *venire* or precept has been returned and filed in my office.

"4. As to whether a *venire* or precept was issued by the district attorney of Albany county to the sheriff of said county, to summon the petit jurors from which the jury was formed by which the said Francis McCann was tried and convicted, or whether the same was issued either for the original Oyer and Terminer, held in Albany county in September, 1856, or for the adjourned Oyer and Terminer, held in November, 1856, I return that I have no knowledge.

"5. As to whether such *venire* or precept was served by said sheriff upon the said petit jury, or the petit jury for either of said courts of Oyer and Terminer, I return that I have no knowledge.

"6. As to whether such *venire* or precept, or any *venire* or precept from the district attorney to the sheriff, for either of said courts of Oyer and Terminer, has been returned by said sheriff, I make my return that I have examined the records and files in my office, and find that no such *venire* or precept has been returned or filed in my office.

"7. As to the authority for summoning the petit jurors who tried and convicted the said Francis McCann for murder, I return that the thirty-six jurors were drawn and summoned for the original Oyer and Terminer, held in September, 1856, in the usual way. That at the said September term an order was entered adjourning the said court to November 10, 1856, and a further order was also granted by said court and filed with me, of which the following is a copy :

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“ ‘ *Albany County Oyer and Terminer*, 1856, Sept. 23.—The court order that the sheriff of the city and county of Albany summon, for the adjourned term of the court, to be held on the tenth day of November next, at ten o'clock, A. M., sixty additional jurors, to be drawn by the clerk in the usual way.’ ”

“ That, in pursuance of such order, I proceeded to draw, and did draw, the names of sixty jurors, in the same manner that the statute requires the names of thirty-six jurors to be drawn for every Circuit Court; that the names of the said sixty jurors were given to the sheriff of said county to be summoned, and at the adjourned Court of Oyer and Terminer, held in November, 1856, twenty-two of said sixty jurors, so drawn as aforesaid, attended as jurors, and sixteen of the original thirty-six jurors, drawn and summoned for the September Oyer and Terminer, also attended as jurors, and the jury by which Francis McCann was tried and convicted was composed partly of said sixteen jurors so attending as aforesaid, and partly of the twenty-two persons so drawn with the sixty as aforesaid.”

The district attorney gave notice of a motion to strike out the *certiorari* and the clerk's return thereto, which motion was argued at the same time with the questions arising upon the bill of exceptions. The questions thus arising sufficiently appear in the opinion of the court.

L. Tremain and R. W. Peckham, for the defendant.

I. The conviction should be reversed, because there was no precept issued by the district attorney to the sheriff. (*McGuire v. The People*, 2 *Park. Cr. R.*, 148; *People v. McKay*, 18 *John.*, 212; 2 *R. S.*, 438, § 69; *id.*, 206, §§ 37, 38; *id.*, 440, §§ 75, 77.) In a capital case a prisoner waives nothing. (18 *John.*, 212; 24 *Wend.*, 566.) The principle of “*stare decisis*” requires that this rule should not be reversed.

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(2 *Park. Cr. R.*, 636 ; 3 *Barb.*, 473 ; 2 *Kern.*, 233 ; *Jewett v. Van Rensselaer*, 2 *Comst.*, 139, 140.) Our criminal statute of *jeofails* only reaches defects in the indictment itself. (1 *Whart. Cr. L.*, 98, 99.)

II. The conviction should be reversed, because the order of the Oyer and Terminer, directing the sheriff to summon sixty additional persons to be drawn by the clerk, was wholly illegal. (2 *R. S.*, 417, § 41 ; *id.*, 419, § 54 ; *The People v. Thurston*, 2 *Park. Cr. R.*, 53.) Trials can only be had before persons summoned as required by law. (2 *R. S.*, 419, § 53.)

III. These errors are properly brought up by *certiorari*. (2 *Park. Cr. R.*, 148 ; 2 *R. S.*, 699, § 45 ; 7 *Wend.*, 478.) 1. They are irregularities. (3 *Chitty Gen. Pr.*, 509 ; *Burr. L. Dic.*, "Irregularity.") 2. They are errors apparent in the record, and therefore the court has no discretion as to whether they shall be corrected. (7 *Wend.*, 427, and cases cited ; 17 *Mass.*, 534, 535.)

IV. The court erred in receiving evidence that deceased and wife had a difficulty eight months prior to the homicide ; also, in admitting proof that the deceased made complaint against him for it ; and especially in receiving proof that, after examination, the prisoner was held to bail. 1. It is enough to set aside a conviction, that the proof may have had an injurious effect. 2. Here, proof of a decision by the court against the prisoner in an assault and battery is received, and that, too, eight months before trial ; why not on this principle, receive proof of his conviction of any offence, although no proof is offered on his part as to character ?

V. The learned judge erred in receiving proof that the deceased had money in bank, as competent evidence to prove motive. 1. The ruling under the old law would have been correct. (2 *R. S.*, 74, § 30.) 2. Under the act of 1848 and 1849, the property would pass to the wife's heirs and not to her husband.

VI. The learned judge erred in excluding the opinion of Dr. Barent P. Staats, as to the state of the prisoner's mind, on the night of July 7th, 1856; also in excluding his opinion founded on his personal examination on the ninth of July. 1. Such examination was regarded by the judge as a material mode of proving insanity. 2. The opinion was competent evidence. (*The People v. Freeman*, 4 Denio, 17, 40.) 3. The privilege given by the court did not change the matter. If the question is proper, counsel had a right to put it. Besides, the privilege assumes that the only insanity was *delirium tremens*, whereas the testimony was, that the witness was not certain as to the cause, but did think he was then deranged. Again, the witness might easily have formed an opinion that the prisoner was deranged thirty-six hours before, and yet been unable or unwilling to give an opinion how long the prisoner had been deranged.

VII. The learned judge erred in excluding the opinions of Drs. Staats and Hoff, who had heard the whole evidence in the case, and were asked to give an opinion, assuming, as the basis of the opinion, that the facts stated by the witnesses were true. (*The People v. Thurston*, 2 Park. Cr. R., 53, and cases cited.)

VIII. The learned judge erred in charging that the defence of insanity must be proved beyond a reasonable doubt, or they should convict. 1. If the jury had reasonable doubt of sanity, they should acquit. (*State v. Marler*, 2 Ala., new series, 43; *Barb. Cr. L.*, 245. 2. The principle of humanity on which the rule as to reasonable doubt is founded, applies with peculiar force to a case where the jury is in doubt as to the prisoner's sanity. In the language of the Alabama court, "can the court repose upon a verdict that was rendered by a jury, every member of which may have had a reasonable doubt of the prisoner's sanity?" 3. In this case the prisoner is required to prove a defence by stronger evidence than any other defence known to the law, and yet from its very nature it is a

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defence the most difficult to be established. 4. If this charge was erroneous, the prisoner is entitled to a new trial whether an exception was taken or not. (*Laws of 1855, ch. 337, § 3.*)

Hamilton Harris, for the people.

I. The *certiorari* and return thereto should be disregarded by this court. 1. They form no part of the record, and are not brought up by the writ of error. The clerk is required to return to writs of error, on judgments in criminal cases, "a transcript of the indictment, bill of exceptions and judgment of the court, certified by the clerk thereof," and the court of review is required to "proceed on the return and render judgment upon the record before them." (2 *R. S.*, 741, §§ 20, 23.) The court of review is confined to such errors as appear upon the face of the indictment or in the bill of exceptions. 2. They are unauthorized by law.

II. If the *certiorari* and return are properly before the court, yet they present no reason for a reversal of the conviction. 1. The omission of a precept from the district attorney to the sheriff to summon the grand and petit jurors is no ground for a new trial. (1.) The indictment was found at a Court of Sessions. A precept is never necessary in that court. (2 *R. S.*, 724, § 25.) (2.) A precept is only required for special or extraordinary terms of Oyer and Terminer and jail delivery, appointed by the special commission of the governor or the warrant of the circuit judge. (2 *R. S.*, 205, §§ 32-37.) Circuit Courts and Courts of Oyer and Terminer shall be held at the same places and commenced on the same day. (*Code*, § 21.) Juries are drawn and summoned only for Circuit Courts and special courts of Oyer and Terminer. (2 *R. S.*, 413, § 24.) Where a Court of Oyer and Terminer shall be held at the same time with any Circuit Court, the jurors returned for such Circuit Court shall be the jurors for such Oyer and Terminer. (2 *R. S.*, 733,

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§ 2.) Therefore a requirement upon the sheriff to summon jurors for a stated Oyer and Terminer would be contrary to the statute and an idle ceremony, as there are no jurors drawn for such Oyer and Terminer, and hence none to summon. (3.) The statute, as to precepts, is merely directory. The issuing of a precept is a matter of form. The omission of it could not, in any manner, prejudice the rights of the prisoner. Hence it is not an irregularity of which advantage can be taken. (*The People v. Ransom*, 7 Wend., 417.) The duties of the sheriff are the same, whether a precept is issued or not. Its function is simply to ask the sheriff to do what, by law, he is bound to do without being asked. Provision is made for drawing jurors. (2 R. S., 413, § 24.) A certified list of the names is to be delivered to the sheriff, who is required to summon the persons named in such list and to make his return thereon to the court. (2 R. S., 414, §§ 29, 30; *id.*, 722, §§ 11, 12.) (4.) The case of *The People v. McGuire* (2 Park. Cr. R., 148) based the decision on the case of *The People v. McKay* (18 John., 212), which was a case of the want of a *venire*, and not of a precept, and was previous to the Revised Statutes. The court, in *The People v. McGuire*, confounded the distinction between a *venire* and a precept. If, however, a precept is to be taken to be a *venire*, as was done in the *McGuire* case, then the Revised Statutes have abolished it wholly for any regular Oyer and Terminer. (2 R. S., 410, § 9.) (5.) The clerk's answer, in the return to the *certiorari*, that he finds no precept on file, furnishes no evidence that none was issued. No return or filing of a precept is required by the statute. 2. There was no error in the order for additional jurors. (2 R. S., 733, § 3; *The People v. Colt*, 3 Hill, 432.) The direction that the jurors to be summoned "be drawn by the clerk in the usual way," is only equivalent to an order to summon, in the words of the statute, "from the county at large." 3. No objection or exception was taken, before conviction, on the ground that a precept had not

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been issued, or to the order or the drawing of the additional jurors. It is too late to raise the questions after conviction. They at most were mere irregularities, working no injustice. (*The People v. Robinson*, 2 *Park. Cr. R.*, 234; *State v. Bird*, 14 *Georgia*, 43; *State v. Brown*, 7 *English*, 623.) 4. Neither the precept nor the order for additional jurors form any part of the judgment record. The error, if any, in order to avail anything to the prisoner, must appear upon the face of the record. Hence, after conviction, neither the want of a precept nor an irregularity in the order for jurors is the subject of review. (1.) That the error upon which motion in arrest of judgment and motion for reversal on error may be grounded should appear on the face of the record is well settled. (*Arch. Cr. Pl.*, 6th ed., 193; *Vermilyea case*, 6 *Cow.*, 555; *S. C.*, 7 *id.*, 108-137.) (2.) The precept is not necessarily or properly a part of the record. The statute requires no return. It is not, in its form or body, returnable. It is simply a command upon the sheriff to do what the law has elsewhere imposed upon him. No return was necessary in order to predicate any future action or proceeding. (*Collin v. State*, 2 *Stewart*, 388; *McKinney v. The People*, 2 *Gilman*, 540.) (3.) The order at the September Oyer and Terminer was to summon sixty additional jurors for the adjourned Oyer and Terminer generally, and not for this case particularly. Therefore it enters not into the record of judgment in this case. The record of judgment in a criminal case consists of what transpires in that case especially, and not of the general business of the court. Otherwise, no record would be complete without the whole history of the court and its transactions. (*Harriman v. State*, 2 *Iowa*, 270; *U. S. Cr. Dig.*, 411.) 5. If there be a defect or imperfection, either in the omission of a precept or in the order for additional jurors, it was a defect in matters of form, not tending to the prejudice of the prisoner, and is therefore covered by the statute of *jeofails*. (2 *R. S.*, 728, § 52.)

III. The difficulties between the prisoner and his wife during the fall, winter and spring previous to her death, and the complaint made by her against him at the police court, were properly admitted in evidence. They showed the prisoner's feelings towards his wife; the enmity which he bore her, and conduct on her part kindling hatred in his breast towards her. The evidence tended to repel the presumption of innocence, arising from the conjugal relation. (*People v. Hendrickson*, 1 *Park. Cr. R.*, 406-416.)

IV. The proof that deceased had deposited money in her own name, in a savings bank, was properly received. It not only bore upon the question of motive, but gave rise to complaints and ill-will on the part of the prisoner towards his wife.

V. The questions asking the opinion of the medical witnesses what the state of the prisoner's mind was on the night of the 7th of July, 1856, and also what, in their opinion, the facts stated by the witnesses, supposing them to be true, showed as to the state of his mind at that time, were properly excluded. The answer to either question would have transferred the witness from his stand to the jury box. Both questions called for an opinion upon the whole testimony, whereas the jury might find a portion untrue, and, perchance, that portion which tended most strongly to form the witness' opinion. (2 *Greenl. Ev.*, § 373, note; *McGlue's case*, 1 *Curt.*, 1; *McNaughton's case*, 47 *Eng. Com. L. R.*, 129, note.)

VI. The question asking the opinion of the medical witness, from his examination of the prisoner on the night of the ninth of July, as to the state of his mind on the night of the seventh of July, was properly excluded. 1. It called for mere conjecture, and not for an opinion founded upon certain principles, or which could be tested by knowledge. (*Whart. Am. Cr. L.*, 94.) 2. The question permitted by the court, in place of the one asked, called for the only

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opinion of the witness which could be tried by professional skill and judgment.

VII. There was no error in the charge of the judge. (*State v. Spencer*, 1 *Zabriskie*, 186; *McNaughton's case*, 10 *Clark & Fin.*, 200; 47 *Eng. Com. L. R.*, 134, 135.) No exception was taken to the charge, or any part of it, on the trial. Therefore, none can be taken now. The third section of the act of 1855, entitled "An act to enlarge the jurisdiction of the courts of General and Special Sessions of the Peace in and for the city and county of New-York," is void. That section relates to "the courts of Oyer and Terminer in this state." The subject of that section differs from that of the other sections in the act, and is not expressed in the title of the act. Therefore, it is in direct conflict with the constitution. (*Laws of 1855*, 613; *Const.*, art. 3, § 16.)

HARRIS, J.—The mode of proceeding upon a writ of error, in a criminal case, is prescribed and governed by the provisions of the Revised Statutes relating to writs of error on judgments and *certioraris* in criminal cases. (2 *R. S.*, 739.) The clerk is required, upon the writ being filed, to make a return thereto, and the contents of this return are specified. It must contain "a transcript of the indictment, bill of exceptions and judgment of the court, certified by the clerk thereof." The court of review is required, without assignment of error or joinder in error, to proceed on the return and render judgment upon the record before them. (2 *R. S.*, 741, §§ 20, 23.) The record before the court contains the indictment and bill of exceptions, together with the judgment of the court below. Upon this record the court of review is required to render judgment. It must, therefore, be confined to the examination of such errors as appear upon the face of the indictment or in the bill of exceptions. Other errors must be corrected in the court where the trial is had. If any error or irregularity has occurred in the organization of the grand jury, the objection

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should be taken upon a motion to quash the indictment, or perhaps by plea. After pleading in bar to the charge, it would be too late to raise the question. (*The People v. Robinson*, 2 *Park. Cr. R.*, 308, and cases there cited.) If any error or irregularity has intervened in summoning or impanneling the petit jury, the defendant, if he would avail himself of the objection, unless he can present the question in the form of an exception to some decision upon the trial, must bring it before the court upon a motion for a new trial. He cannot make it a ground of reversing the judgment upon error.

Before the adoption of the Revised Statutes, the practice upon bringing error in criminal cases was similar to that in civil actions. The plaintiff in error, if he relied upon any error which did not appear upon the face of the record, might, in a special assignment of errors, allege diminution and pray for a *certiorari*. (*Pelletreau v. Jackson*, 7 *Wend.*, 478; *Lambert v. The People*, 7 *Cov.*, 103.) Upon the revision, this practice was retained in civil cases (2 *R. S.*, 599, § 45), but, as we have seen, it was no longer applicable to criminal cases.

In *McGuire v. The People* (2 *Park. Cr. R.*, 148), the plaintiff in error, after a general assignment of errors, made a special assignment and alleged diminution. A *certiorari* was issued, to which the clerk made a return, which has evidently been used as a precedent for the return in this case. The district attorney joined in error, and the plaintiff demurred to the joinder. The district attorney joined in demurrer, and the case was argued upon the issue thus made. There was no bill of exceptions in the case, nor is there in the report of the case any allusion to the change made by the Revised Statutes in the mode of reviewing judgment in criminal cases. The case was conducted throughout according to the common law practice, and that, too, without objection. In this respect, it stands alone. No other case will be found in which "the out branches of the record"

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have been brought up by *certiorari* for the inspection of an appellate court, since the Revised Statutes took effect.

By the fifty-second section of the article relating to "indictments and proceedings thereon" (2 R. S., 728), it is declared that no indictment shall be deemed invalid, nor shall the trial, judgment or other proceedings thereon be affected, by reason of any defect or imperfection in matters of form, which shall not tend to the prejudice of the defendant. Now, if it be assumed that by some inadvertence or oversight the provision of the statute (2 R. S., 206, §§ 37, 38) requiring the district attorney to issue a precept at the time and in the manner specified, commanding the sheriff to summon the several persons who shall have been drawn in his county pursuant to law to serve as grand and petit jurors at any Court of Oyer and Terminer and jail delivery in his county, is still unrepealed, can any one conceive of a proceeding more completely a matter of form than the issuing of such a precept? Is it possible for the defendant to be prejudiced by the omission of the district attorney to issue such a precept? Provision is made by law for drawing both the grand and petit jurors. A certified list of the names is to be delivered to the sheriff, who is required to summon the persons named in such list, and to make his return thereon to the court. (2 R. S., 414, §§ 29, 30; *id.*, 808, §§ 11, 12.) No *venire* need be issued. (2 R. S., 410, § 9.) The jurors returned for the Circuit Court are jurors for the Oyer and Terminer. (2 R. S., 733, § 2.) Whether, therefore, a precept is issued or not, the duties of the sheriff in respect to the summoning of the grand and petit jurors are the same. The only return he is required to make, or upon which the court is authorized to act, is upon the certified list delivered to him by the clerk. The issuing of the precept is but an idle ceremony. It in no way affects the duties of the sheriff or the rights of the defendant. There is no law recognizing that it should be returned; and the fact that the clerk certifies that, upon search, he finds no

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such precept on file in his office, furnishes no legal evidence that none was issued.

Before the adoption of the Revised Statutes, a *venire* was necessary in all cases, civil and criminal. The want of it was deemed sufficient ground for reversing the judgment in *The People v. McKay* (18 John., 212). The learned judge who pronounced the opinion of the court in *McGuire v. The People*, overlooking the distinction between a precept and a *venire*, as well as the fact that the mode of proceeding in such cases has been entirely changed by the Revised Statutes, seems to have regarded the case of *The People v. McKay* as controlling authority upon the question whether the omission to issue a precept was ground for the reversal of a judgment.

I am inclined to regard the language of the section requiring the district attorney to issue a precept to the sheriff at least twenty days before the holding of a court of Oyer and Terminer as sufficiently broad to make it applicable to all such courts; but as it is a matter which can in no possible manner concern the parties to be tried at such court, or indeed, anybody else, and as the duties of the sheriff are in all respects the same, whether the precept is issued or not, I regard the provision, like that which requires the sheriff to make proclamation before the sitting of the court, and other hundred provisions, as merely directory, and that, therefore, an omission to obey such directions does not invalidate the judgments rendered at such courts. But even if this were not so, the only way in which advantage could be taken of the want of such a precept would be by a motion in the same court to quash the indictment, or for a new trial, or in arrest of judgment, according to the circumstances. Upon *certiorari* or error, this court could only reverse for such errors as appear upon the face of the indictment or in the bill of exceptions. The motion to strike out the *certiorari* and the clerk's return thereto should, therefore, be granted.

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It only remains to consider the grounds of error alleged in the bill of exceptions. The defendant was tried for the murder of his wife. The homicide took place on the 8th of July, 1856. It was proved that, until the last week in May, the defendant and the deceased had lived in John-street, in the city of Albany. The district attorney then offered to prove, by a witness who resided next door to the defendant, that when he lived in John-street he had difficulty with his wife. The evidence was objected to by the counsel for the defendant as immaterial. The court overruled the objection, and the counsel for the prisoner excepted. The witness then testified that the deceased, in the fall of 1855, came to her house; that it was on a very cold Saturday night; that the defendant came in after her at twelve o'clock at night, and began to jaw and scold and abuse her; called her a whore; threatened the witness for keeping her; that the deceased went after a policeman to have him taken; that she came back and stayed all night; that the next Monday she made complaint against him; that the witness heard jawing all next day between them, in their room; that she heard them jawing and quarreling every week after; that the defendant talked the most.

The evidence was clearly admissible. It tended to show an alienation of affection. (*The People v. Hendrickson*, 8 How., 412.) Nor was the time mentioned by the witness so remote from the homicide as to render the testimony irrelevant. If the parties were "jawing and quarreling" from November until April or May, it would not be very unreasonable for the jury to infer that the same state of feeling continued until July.

The district attorney offered to prove, by one of the police justices of the city, that in November, 1855, the deceased had made a complaint against the defendant for an assault and battery. This evidence was objected to by the counsel for the defendant as being too remote and otherwise improper and irrelevant. The objection was overruled and the

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counsel for the defendant excepted. The witness testified that the deceased made a complaint against the defendant for assault and battery on the 26th of November, 1855, upon which he was arrested and an examination had; that the defendant was held to bail. The last answer was objected to by the counsel for the defendant, as being irrelevant, but the objection was overruled and an exception was taken. The testimony was properly received. It tended to show the extent of the difficulty between the parties. The evidence might properly be considered by the jury on the question of motive. (*People v. Hendrickson*, 9 How., 165.) "Considerable latitude," says Parker J., in delivering the prevailing opinion in the Court of Appeals, "is allowed on the question of motive. Just in proportion to the depravity of the mind, would a motive be trifling and insignificant which might prompt to the commission of a great crime."

The district attorney proved that the deceased had deposited at one time, in the fall of 1855, \$100 to her own credit in a savings bank in Newburgh, and in June, 1856, \$150 more; that a bank-book was issued in her own name and left with her sister in Newburgh; that the defendant complained that he had no money; that what money there was his wife had taken to Newburgh and put in the bank, and she had the bank-book. This evidence was objected to as improper and irrelevant, but the objection was overruled and an exception was taken. The objection was not well taken. The evidence showed not only the existence, but one of the sources of the ill feeling of the defendant towards his wife.

A physician was called by the defendant, who testified that he saw the defendant on the evening of the ninth of July; that he went into his cell and conversed with him; that he thought he was then deranged; he thought it was *delirium tremens*, produced by previous drinking; that he knew defendant's habits of drinking, and supposed drinking was the cause of his insanity; that he was not certain as to the cause; that he had been present and heard all the

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evidence given upon the trial. He was then asked by the counsel for the defendant what, in his opinion, was the state of the defendant's mind on the night of the 7th of July, 1856. The question was objected to by the district attorney, and the objection was sustained. The counsel for the defendant excepted to the decision. The witness was then asked what, in his opinion, founded on his personal examination of the defendant on the night of the ninth of July, was the state of his mind on the night of the seventh of July preceding. The question was objected to by the district attorney. The court sustained the objection, on the ground that it called but for conjecture, but allowed the witness to state how long he thought the defendant, when he saw him, had been in a state of *delirium tremens*. The defendant's counsel excepted to the decision.

I think it was competent for the defendant's counsel to have the opinion of the witness as to the state of the defendant's mind at a time anterior to the time of the examination upon which the opinion is founded. The witness had examined the defendant two days after the homicide. He had testified that, in his opinion, he was then deranged, and that he thought *delirium tremens* was the cause of such insanity. The defendant had a right to pursue this inquiry, and to have the opinion of the witness whether the state of mind in which he found the defendant on the evening of the ninth of July had existed on the evening of the seventh of July. Had the court excluded this evidence altogether, I should have deemed the decision erroneous. But the court merely excluded the question in the form in which it was put to the witness, at the same time allowing him to state how long, in his opinion, the defendant had been in a state of *delirium tremens* when he saw him. The difference between the question as it was put to the witness by the defendant's counsel, and the form in which it was allowed to be put by the court, is very slight indeed. It was quite immaterial, as it seems to me, in which form the inquiry

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was presented. So long as the defendant's counsel was permitted to inquire of his witness how long, in his opinion, the state of mind in which he found him on the evening of the ninth of July had continued, I cannot see that he had any reason to complain of the decision. (*The People v. Freeman*, 4 Denio, 40.)

The counsel for the defendant asked the same witness what, in his opinion, the facts stated by the witnesses on the trial, supposing them to be true, showed as to the state of the defendant's mind on the night of the seventh of July, the time his wife was killed. The question was objected to by the district attorney and excluded by the court. But at the same time the court decided that the witness might be asked his opinion upon a hypothetical case corresponding to the testimony, or by reading him the testimony and asking for his opinion, on the supposition that those facts were true. The defendant's counsel excepted to the decision. I am utterly unable to distinguish between the question excluded by the court and those which were allowed. The witness was asked his opinion upon the facts stated by the witnesses, supposing them to be true. This he was not allowed to state, but at the same time the court allowed the defendant's counsel to suppose a case corresponding with the testimony and ask the witness his opinion upon such supposed case, or to read to the witness the testimony, and ask him, upon the supposition that those facts were true, what would be his opinion. I cannot see that by this decision the court excluded any evidence to which the defendant was entitled.

The examination of a medical witness, for the purpose of obtaining his opinion upon the facts developed upon the trial, is attended with some difficulty. If, as was proposed in this case, the witness is asked his opinion as to the state of mind of the defendant, upon the supposition that everything stated by the witnesses is true, it may happen that the jury will believe only a part of the testimony. In such a case it is obvious that the opinion of the witness

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would be inapplicable to the facts found by the jury. The question that was put to the physician in this case, and upon which he gave his opinion, embraced more than twenty distinct facts which had been mentioned by the witnesses in the progress of the trial. Assuming all these to be true, the witness said he should think the defendant insane. But suppose the jury believe some of them to be true and others not, it follows that they have no opinion upon the actual state of facts found by them. The proper mode of examining such a witness is, in my judgment, first to inquire of him as to the particular symptoms of insanity, asking whether all or any, and which, of the circumstances spoken of by the witnesses upon the trial are to be regarded as such symptoms, and then to inquire of him whether any and what combination of these circumstances would, in his opinion, amount to proof of insanity. (*Wharton's Am. Cr. L.*, 94.)

The presiding judge charged the jury that if they were satisfied from the evidence that, at the time the alleged offence was committed, the prisoner, in consequence of partial insanity, was laboring under such a defect of reason as not to be conscious of the nature, character and consequences of the act, or not to know that the act was wrong, he should be acquitted; that the fact of the killing was admitted, and that the act was done by the defendant was not disputed, and thus the issue was really reversed from the usual one.

The judge further charged that insanity is a defence to be affirmatively proved; that a failure to prove it, like a failure to prove any other fact, is the misfortune of the party making the attempt to prove it; that as sanity is the natural state, there is no presumption of insanity, and the defence must be proved beyond a reasonable doubt; that if the defendant had satisfied them beyond a reasonable doubt, so that they should find that at the time of killing he was so far really insane as not to be responsible for the act, they should acquit him, but otherwise they must convict him.

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No exception was taken to the charge; but the counsel for the defendant insists that to instruct the jury that the defence of insanity must be established beyond a reasonable doubt, before the jury would be authorized to acquit the defendant, was erroneous, and, though no exception was taken, the judgment should be reversed and a new trial awarded. The third section of the act of 1855, entitled "An act to enlarge the jurisdiction of the Courts of General and Special Sessions of the Peace in and for the city and county of New-York" (*Laws of 1855*, 613) declares that every conviction for a capital offence, &c., shall be brought before the Supreme Court and Court of Appeals, from the Courts of Oyer and Terminer in this state, by a writ of error, with a stay of proceedings as a matter of right; and that the appellate court may order a new trial, if it shall be satisfied that the verdict against the prisoner was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below.

I am inclined to think this provision inoperative and void, so far as it relates to "the Courts of Oyer and Terminer of this state." The object of the act in which it is found is entirely local. It is to enlarge the jurisdiction of certain local courts in the city of New-York. The sixteenth section of the third article of the constitution declares that no local bill shall embrace more than one subject, and that shall be expressed in the title. I regard the provision in question as a palpable violation of this salutary restriction upon legislation. Who would have expected to find, in a bill to enlarge the powers of local courts in the city of New-York, a section making a radical and most important change in the powers of the Supreme Court and Court of Appeals? Instances had occurred in which important enactments had been smuggled through the legislature under cover of some bill with a modest and unpretending title; and to guard the legislature, as well as the public, against this kind of imposi-

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tion, the framers of the constitution adopted the section to which I have referred. I cannot suppose that any legislature would have been willing to adopt the third section of the act in question, without qualification or restriction, if brought to its attention by a direct proposition to amend the law relating to writs of error and appeals in criminal cases. Such a provision, I am persuaded, could only have made its way through the various forms of legislation by clothing itself with the guise of a local measure, and thus eluding the scrutiny which its own importance would have attracted.

But I propose, now, to consider the grounds of objection to the charge, as though an exception had been taken in due form, that we may see whether justice, in fact, requires that a new trial should be granted; for I admit that, if it can be seen that the verdict is either contrary to law or against the weight of evidence, some remedy should be provided to save the defendant from the fatal consequences of the error.

The only complaint made by the defendant's counsel in respect to the charge is, that the judge instructed the jury that the defence of insanity must be proved beyond a reasonable doubt. In this I think there was no error. If it had been doubtful whether the defendant had committed the act with which he was charged, he would have been entitled to an acquittal upon the legal presumption of innocence which the law raises in his favor. By that presumption every man is held innocent until his guilt is established. But there is another legal presumption, equally operative as a rule of evidence, which is, that every man is presumed to be sane until his insanity is proved. So strong is the presumption of innocence that it can only be overcome by proof which establishes guilt "with a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it." This is what is called proof beyond a reasonable doubt. In like manner, the presumption of sanity must be overcome by proof of the same description. "What I mean

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is," says Chief Justice Hornblower, in *The State v. Spencer* (1 *Zabriskie*, 186), "that when the evidence of sanity on the one side, and of insanity on the other, leaves the scale in equal balance, or so nearly balanced that the jury have a reasonable doubt of his insanity, then a man is to be considered sane and responsible for what he does. But if the probability of his being insane at the time is, from the evidence in the case, very strong, and there is but a slight doubt of it, then the jury would have the right, and ought to say, that the evidence of insanity is clear. The proof of insanity at the time of committing the act ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be, in order to find the sane man guilty." (3 *Greenl. Ev.*, §§ 5, 29.)

The great object of punishment is the protection of society. The guilty are punished that the innocent may be secure. Such punishment is only due to those who are conscious of crime. Humanity revolts at the very thought of making a man who is unconscious of wrong the subject of criminal punishment. While, therefore, the defence of insanity should not be regarded with disfavor, yet, as it asks that the offender, though guilty of the act charged against him, may be excused from punishment, it is the duty of those who administer the law to see that such a defence is fully sustained by satisfactory proof before it is allowed to prevail. I cannot see that anything more was done in this case. The charge of the learned judge who presided at the trial was, in my judgment, unobjectionable. I think the judgment of the Oyer and Terminer should be affirmed.

GOULD, J. Having, in the case of *The People v. John Cummings*, considered the preliminary questions (as to the irregularity in organizing the jury, first, on account of the district attorney's not issuing a precept, &c.; secondly, by reason of the form and substance of the order of the Oyer and Terminer for summoning sixty additional jurors), it is unneces-

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sary to repeat my views on those points; I therefore proceed to the points, as to rulings and charging, that are in this case only.

The prisoner's fourth point or exception is, like his fifth, upon a matter of evidence, referring chiefly, if not solely, to the motive the prisoner might have had for committing the homicide, for the purpose of showing that he did the act. This was actually the only ground on which it was offered, or objected to, or received, at the trial; and, in this point of view, the rulings, even if they were erroneous, would neither of them furnish any ground for ordering a new trial; since it appears in the bill of exceptions, and such was notoriously the fact, that before the defence commenced it was admitted, and it was so expressed by his counsel in opening his case, that the prisoner did the act. It is true that, on the argument here, such counsel claim that this testimony had a bearing on the question of insanity; but if it had, there are three sufficient answers to the exception: First. There was no such ground, for its exclusion, taken at the trial; Second. Had such ground been taken, or letting it be taken here, though not taken there, so far as the question of insanity is concerned, the proof is not as remote, in time, as the testimony the prisoner was allowed to give; Third. If it could have any bearing on that question (insanity), it could be only by furnishing a motive for a sane man to do the act; and that, whether he wished her to give him the money, and was angry that she did not, or thought that by killing her he would, as her administrator, get the money; and in that light it was eminently proper on that issue.

The first division of the sixth exception refers to a question put to Dr. Staats and excluded by the court. The mere reading of the question shows it entirely too vague to be allowed, having neither a necessary basis in the testimony, nor any basis given it in the question itself; a mere loose opinion, entirely inadmissible. The other division of that exception is, of necessity, to be read in connection with the

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permission to ask a question varying somewhat from the one excluded. That permission shows, necessarily, what was the exact fact, that at the time of putting this question there had not been the remotest intimation to court or jury, or the faintest idea, even in the minds of the prisoner's counsel, of an attempt to show any other kind of insanity than *delirium tremens*. This being so, the form of question suggested by the court was the only proper form, inasmuch as it required, not a general, vague, undefined opinion of some lack of reason, but a definite, professional opinion as to the prior continuance of the particular disease inquired for; and it put that opinion in a shape to be tried as a matter of professional skill and judgment. And, since we are to hear opinions, it should be borne in mind that they are to be only those of competent, skillful men; and then, so limited and precise, that other competent and skillful men can judge of, and testify as to, their accuracy. Any other rule is little short of making an opinion a verdict; since, if an opinion (such as was asked for) can be given, I see no qualification or test of its accuracy that can be applied by another witness or by the jury.

In regard to this point, and indeed to the whole case, it ought to be remarked that no bill of exceptions, in such a case, should ever be allowed, unless it contain the whole case with all the testimony. In the present case, points like the one just spoken of (and there are others in it in the same position) come before a court that has no means of knowing what the true case was, and who, therefore, must to some extent decide in the dark. Were this case before us as it was tried, it would present a very different aspect.

As to the form of the question to be put to medical witnesses, covered by the seventh exception, it involves this consideration: whether it is ever proper to allow testimony, which is at best a mere opinion, to be sought by an interrogatory so shaped as to leave the reply open in any degree to the construction, in the minds of the jury, that the medi-

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cal witness believes, or gives weight to, or in any manner sanctions as worthy of belief, the testimony which others have given as to facts. The form used, objected to and excluded, was, to a witness who had heard all the testimony: "What, in your opinion, do the facts stated by the witnesses on the trial, supposing them to be true, show as to the state of the prisoner's mind on the night of July 7th, 1856, the time his wife was killed?" In excluding it, it was stated that "it seemed impossible to ask this question without allowing the witness to answer, in fact, on his own impression of the truth of the evidence." And the prisoner was allowed to ask the witness' opinion on a hypothetical case, corresponding to the testimony, or by reading to him the testimony and asking him on the supposition that those facts were true; an allowance of which he very fully availed himself.

To show that this ruling was erroneous, we are cited to *The People v. Thurston*, tried in 1852 (2 *Park. Cr. R.*, 49, and cases there cited). In that case a new trial was granted by three of the four justices holding the general term; two founding their decision on the admission of improper evidence not touching the point here taken; and the third, Mr. Justice SHANKLAND, taking the ground that a witness who had not heard all the evidence could not give his opinion of the state of the prisoner's mind; and therefore, such testimony having been received in that case, he allowed a new trial, a position of which I certainly shall not dispute the soundness, especially when I find that the question, which he decided to have been improperly admitted, was in this form: "From what you have heard of the case, and what you have read of it, and what you know of it, what are your views of it?"

In the reasoning with which he accompanies his position he certainly states what would substantially sustain the position here taken by the prisoner's counsel. But any one who will read that case, and see how strangely the questions

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were put, unobjected to, on all sides, will see that a very great temptation was laid in the way of any judge to go beyond the case in his comments. The questions put on the part of the prisoner had brought out this testimony: "the evidence presents to my mind a very extraordinary case; I have never seen one exactly like it. This case, I am constrained to think, taking all the various symptoms as stated by the witnesses to be true, and taking all the circumstances together, is one resembling, if it be not decidedly, such as is described in the books as instinctive or impulsive mania," &c., &c. And again: "Taking the evidence I have heard to be true, it appears to me that it shows the results of habits, &c., acting on a predisposition to insanity, and is, with the symptoms of general ill health, as detailed by the witnesses, very indicative, previous to the act, of the formative state of insanity." And again: "From what I saw of him in the jail, and from all the evidence given in the case bearing on the state of his mind at the time of the act, I think he was then insane." Observe, this witness does not qualify his opinion of the evidence by taking it to be true, and none of them treat it as questionable, by saying, "supposing it true." I must profess myself unable to see anything, worth naming, to be left to the jury, if this be legal evidence, especially when I find in the same case (*p.* 138) the opinion of the court, saying, "that where the medical witnesses are men of integrity and skill, and all agree that a given state of facts proves insanity, it is the solemn duty of the jury so to pronounce by their verdict." Thus taking it for granted that, though the "state of facts" is matter of proof, and the medical witnesses speak from the evidence, and by law the jury are to pass on all the evidence, there can be a "given state of facts" on that evidence, and saying that on that the medical witnesses give the verdict. I certainly am not prepared to go any such length, and it seems to me that nothing resembling public justice could long survive such doctrines.

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In the *McNaughton case*, on the trial at *Nisi Prius*, the question was asked of a medical man who had been present in court and heard the evidence, whether, as matter of science, the facts stated by the witnesses, supposing them to be true, show a state of mind incapable of distinguishing between right and wrong. And it was allowed (10 *Clark & Fin.*, 200), and the prisoner was acquitted. So that the point under discussion was not decided in that case, except on the trial.

We will now see what was the opinion of the judges, as given to the House of Lords, on this, as one of the questions which that acquittal caused to be asked. (47 *Eng. Com. L. R.*, 129, *note*.) The precise question put to the judges was "Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime; or, his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law; or, whether he was laboring under any, and what, delusion at the time?" In reply, Mr. Justice Maule says "In principle, it is open to this objection, that as the opinion of the witness is founded on those conclusions of fact which he forms from the evidence, and as it does not appear what those conclusions are, it may be that the evidence he gives is on such an assumption of facts as makes it irrelevant to the inquiry." But as it was allowed in the *McNaughton case*, on the trial, he considers that to be, for England, a precedent, but against principle.

The other judges joined in an opinion delivered by the Chief Justice, Tindal; and to this same question, treating its branches as distinct questions, they say: "We state that we think the medical man, under the circumstances supposed, cannot, in strictness, be asked his opinion in the terms above stated, because each of those questions involves

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the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions on a matter of science, in which case such evidence is admissible. But where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right." I can only say that, to me, this seems not precisely an affirmative answer to the question. And it should be specially noted, that the words used, "facts admitted, or not disputed," are decidedly stronger than any supposed form of question ("supposing them to be true"). And yet, even with those strong words, "the question cannot be insisted on." (a) But see (2 *Park. Cr. R.*,

(a) The full and exact meaning of this ruling, as to proving insanity, should be carefully noted. I think it contains what must ultimately be, and ought at once to be, fixed as the precise and only standard for such examinations. It says that in the very strongest possible case, a given case, the "facts admitted," when the question becomes, so far as the witness is concerned, one of mere professional skill and judgment, though it may be convenient, it is not a matter of right, to ask a general opinion as to insanity of a witness, who, not having personal knowledge of the accused, gets his facts from other witnesses: since, though, as those facts are admitted, he may, for the purposes of that case, be said to know them, he cannot know from anything but personal knowledge their combined effect, resulting in constituting the general apparent state of the man, which is the least that can authorize his giving, or qualify him to give a general opinion. When he founds such opinion on his own observation, you examine him in detail as to the particulars which he saw; and how, and why they, as symptoms of disease, constitute a basis for his opinion; and both by his own evidence and manner, as well as by calling other experts, as to his reasons in detail, you are able to apply a test to his opinion, general and particular: so that it is left to the jury to say of his, as they, and they only, are by law entitled to say of all testimony, whether his opinions have been formed or given dishonestly, or under a bias which disqualifies him, and presents him to them as not to be relied on; or whether, if both formed and given ever so fairly, he is so competent to judge that it is safe to follow his opinions.

And when others give evidence as to the facts (since the mercy of the law entitles the prisoner to every chance of making his proof, and so permits him even then to ask an opinion), you must so shape your questions as to keep as nearly as possible to the same sound principles. As the witness has observed no apparent general state, so he must give no general opinion. As he is told

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135), the case of *The People v. Thurston*, where it is said the question was answered affirmatively; and the dictum is based on that.

We are referred also to a case in the court of appeals, decided in 1855 (three years after the decision in the *Thurston case*), which is, like some of the prior cases, mainly to the point that a medical witness who has not heard all the testimony cannot give an opinion, as to sanity, founded on the part he has heard (2 *Kern.*, 358), and also to the point that it was improper to exclude hypothetical questions on a cross-examination. There is, however, a remark, not a decision, in the opinion given in that case by Mr. Justice Hand (*p.* 362), that such a question as the one approved, as above, in 2 *Parker's Criminal Reports*, cannot be asked if objected to, he considering that it involves the witness' determining in his mind as to the truth of the evidence he has heard, while that should be left to the jury. On this point the other judges expressed no opinion, as it was not strictly in the case.

I can only add, that every step I have taken, in a careful and minute investigation of all the authorities referred to, has but confirmed me in thinking that the decision of the Oyer was on this point quite as liberal a one as any sound legal principle will sanction. It allowed the asking of an opinion on "a given state of facts," or a supposed one; merely taking care so to separate the opinion from the testimony that the

single facts, or at most, in any one connection, but so many as any one witness relates, so he can only give his opinion whether such a fact, or such a connection of facts, if existing, is a symptom of disease of the mind, and of what type of disease; and whether a usual symptom, a necessary one, or an infallible one; and to what stage of the disease it belongs. You thus, and thus only, have an opinion so definite that you can apply to it the tests before spoken of.

And it is but to this latter and limited extent that, in strict legal principle, an opinion should be allowed, even as evidence, to go to the jury; and this only from the necessity of the case. And always, and everywhere, any opinion, no matter how high the standing of the witness, or how honest and intelligent that opinion, can be but evidence; or we must not pretend that we preserve the "trial by jury."

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jury might not misunderstand the witness and suppose he was passing on the evidence, and, what is quite as important, that the witness might not mistake his position, and think himself authorized by virtue of his profession to pass on the whole case: for a thorough example of which, one need go no further than the extracts above given from the testimony in the *Thurston case*.

The remaining ground of exception (the prisoner's eighth point) is one that is of great interest, not merely in this particular case, but to the whole community, as it concerns the entire administration of justice in criminal cases. The frequency—a frequency that is so great as to have passed into a proverb, if “a by-word” be not the apter phrase—the great frequency of the interposition of this plea of insanity, whenever and wherever punishment hangs imminent over crime, makes absolutely necessary the adoption of some rule, that shall be both based on sound principles and of plain and easy application, while it shall to the prisoner and to the public secure neither more nor less than even handed justice. And while all human tribunals are bound to treat with reverence the dispensations of Providence, and to deal kindly with those who suffer under such dispensations, those tribunals have also in charge the general good of the whole community, and the personal safety of every member of it. Well, then, and carefully, does it behove us to inquire what is the nature of this defence of insanity, and by what kind and what degree of proof is it to be made out.

To keep the precise point in view: the charge, so far as relates to this exception, was: “the question of insanity is matter of positive defence, and it is a defence to be affirmatively proved. A failure to prove it is, like the failure to prove any other fact, the misfortune of the party attempting to make the proof. And in this case, as in all cases of fact, you are not to presume what has not been proved, under the distinctions and upon the principles already given you. The act being plainly committed, and that the

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prisoner did it being undoubted, and the defence being set up on his part that he was insane, the burden of proof is shifted. In the proof of the deed itself, if any reasonable doubt be left on your minds, the prisoner is to be acquitted. But as sanity is the natural state, there is no presumption of insanity. And the defence must be proved beyond a reasonable doubt. If, canvassing the whole evidence on the legal principles laid down in this charge, the prisoner has satisfied you, so far beyond a reasonable doubt, that you find that he was at the time of the killing so far really insane as not to be responsible for this particular act, you acquit, otherwise you convict."

This is claimed by the prisoner's counsel to contravene the rule established in trials for capital offences, that the prisoner is entitled to the benefit of a reasonable doubt of his guilt. And they thus paraphrase the rule: "if the jury had a reasonable doubt of sanity, they should acquit." This is not the rule, but a perversion of it, and the very language used begs the whole question; it assumes that, on the part of the prosecution, sanity is to be proved: for it is too plain to admit of argument, that the rule, as to a doubt, never did and never can apply to what the prosecution is not bound to prove. And sanity is not a condition or state which the law compels the prosecution to prove. Being man, the accused is possessed, in legal presumption, of the powers and faculties of body and mind which are included in the name. And the only proof to be made on that point is that of the defence: and the defence asserts the fact that the prisoner differs from other men; that the reason, which is a part of his human nature, is impaired or lost; that he has ceased, by the positive operation of disease, to be the accountable agent described by the word man. Of necessity, and to the least informed understanding, the burden of proving this fact rests on him who asserts it. And suspicion is not proof; a doubt is not proof; raising a doubt is not proving a fact.

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These positions are but amplifications of the charge which is objected to. And the true tenor of that charge, its length and breadth, with or without the words "beyond a reasonable doubt," is fully covered by what, though not in the bill of exceptions, was actually a part of the charge as given to the jury: "The prisoner must satisfy you, by proof, that he was so far really insane as not to be responsible for this particular act." This surely covers the whole ground; for, if on any point the mind be satisfied, it is utterly impossible that it can, on that point, have "a reasonable doubt." The two states of mind, doubt and satisfaction, cannot coexist on one point; and, to apply to this the most unquestionable legal principle, a jury cannot find a fact as proved which is not proved to their satisfaction. By their oath, they are bound to find "a true verdict according to the evidence;" and the fact of insanity is to be found, not suspected. Every proper charge, touching on insanity, to a jury, says: if you find that the prisoner was insane at the time, you acquit.

Thus far, as a matter of reasoning. Let us now see what, if any, is the authority. And for this we cannot, probably, do better than to resort to the opinions given to the House of Lords; to which both parties before us, and all our own reported cases, are so ready to refer. And (47 *Eng. Com. L. R.*, 134, 135) I find all that is by them said on this point in the opinion (of all but Justice Maule, who says nothing on this point) given by the chief justice, which says: "The jury ought to be told, in all cases, that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity it must be clearly proved that at the time of the committing of the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." I can see no point of the preceding

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reasoning in support of the charge which is not completely covered by this opinion. "Proved to their satisfaction" is even more absolute in signification, without the words "beyond a reasonable doubt," than it would be with them. And, so far as I am informed, by the argument or otherwise, there is no authority varying from this but the 2d Alabama, (p. 43); and, from that, the quotation on the points for the prisoner is such as by no means to entitle it to prevail against the opinions above quoted. Mark the phrase: "Every member of the jury may have had a reasonable doubt of the prisoner's sanity." This is, perhaps, a degree above suspicion; but, if it be, it does not state the issue; it reverses it; since such a remark can apply to no point which the prosecution is not bound to prove.

In the very ingenious and strongly urged argument on behalf of the prisoner, two matters of defence were claimed to be analogous to that of insanity; in each of which two the prisoner is entitled to the "benefit of the doubt." But I think a strict examination of them will show that neither one really bears out the supposed analogy. The first of them is an *alibi*. This surely affords no parallel to the defence of insanity; as presence at the act, unlike sanity, is not presumed; and the proof of an *alibi*, though in itself affirmative, goes to what the law assumes to prove affirmatively; that is, that the prisoner, the physical being on trial, did the act; and such defence is, substantially, but in the nature of conflicting evidence. It is not a separate, or a separable, issue, but a fact going to the main issue already made, and is a mere contradiction of the people's affirmative of the issue; a negative of an averment necessary in the indictment, and one requiring to be made certain, by proof, to the satisfaction of the jury; or, which as above shown is the same thing, "beyond a reasonable doubt." And proof beyond a reasonable doubt cannot be predicated as necessary to both sides of one and the same issue. So, a reasonable

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doubt on that issue, the people's affirmative issue, of course, acquits.

So of the other asserted analogy: "A homicide being proved, the defence proves circumstances to show that the killing was done in self-defence." The very statement shows it not analogous. The proof, though affirmative, i. e., positive, not affirmative as meaning the affirmative side of an issue, is but of circumstances connected with the very deed, with the doing of the act charged as a crime, in the indictment, and to be proved by the people. Acting in self-defence is part and parcel of the transaction, of its very manner and substance; and, whether shown by the witnesses for the prosecution or by witnesses called by the accused, is but in the nature of conflicting evidence on the main issue; like a cross-examination, going to the body of the charge. It is as strictly but showing how the killing was done, as would be evidence, cross or direct, tending to show the killing to have been accidental.

Nor is it sound, either in law or in logic, to say that insanity is like any other negation of the offence; that it is but saying this man did not commit it, but a different being, a madman did it. This is already fully answered; this person did it; and if you assert that he is a different being from what he appears to be, claim him to be governed by delusion instead of reason, to be diseased, to be a madman, prove it.

And it is but a modification of the same position to say that, if the act were done by an insane man, an essential ingredient of crime was wanting, there being an absence of intent, which intent, either presumed or proved, is an affirmative part of the prosecution's case, and is to be shown "beyond a reasonable doubt." To this the answer is, the intent is not wanting even were the person a raving maniac. The maniac intended to do what he did, to kill the person killed; for there is a very different defence in accidental killing. But the maniac is not responsible for his intent or

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its consummation, though cunningly planned, long premeditated and cruelly carried out. It is the responsibility that is wanting; and the excuse interposed to avoid this responsibility, to prevent the effect of an intent which, unexcused, has every essential of an intent legally criminal, is not any thing incident to, or part of, or connected with, the act, but exists in the man and not in his deed.

There is a further position on the prisoner's points which deserves at least a passing notice. This "bill of exceptions" shows that no exception was taken on behalf of the accused to any part of the charge, and that no request on his part to charge was denied. To any man of common sense, and much more to a lawyer, it would seem that the prisoner had, in the charge to which he consented, nothing to complain of, and no right now to except to that to which he then agreed. But an act of the legislature (*Laws of 1855, 613, § 3*) interferes with this plain common sense and this plain common law, and says that, "whether any exception shall have been taken or not," on the trial, the prisoner, if convicted, can take, on writ of error, as matter of right, any exception in or out of the case, and shall be at liberty to claim a new trial on any ground he can find, or suggest, or invent, before the court above. Under this act, if the prisoner does not like the looks of his jury or if he does, or if he thinks two chances better than one, or if he thinks it pleasant to play with the law, its officers and courts, or wishes to know the whole of the people's case to fit to it a defence made up, he has only to allow an improper question to a witness to pass unchallenged, or even by his own suggestion have an improper ruling made, and then bring his writ of error, and bring in his false defence, or try his luck once more; and this experiment he may repeat as often as the shape of his case will let him. I think the act must be admitted to be most remarkably adapted to the attainment of justice! Still, if such be the law of the land, it is to be enforced.

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Is it the law of the land? The constitution (*art. 3, § 16*) says no private or local bill shall embrace more than one subject, and that shall be expressed in the title. The title of the act in question is, "An act to enlarge the jurisdiction of the Courts of General and Special Sessions of the Peace in and for the city and county of New-York;" as plainly a local bill as one for opening a park in that city. But the third section of that act says, at the page above referred to, "every conviction, &c., shall be brought before the Supreme Court and Court of Appeals, from the Courts of Oyer and Terminer of this state, or from the said Court of General Sessions, &c., by a writ of error, with a stay of proceedings, as a matter of right." There is here put into a local bill a general provision totally different from the purposes of the act, embracing another subject, an entirely foreign jurisdiction, so far as the "city and county of New-York" are concerned and their Courts of Sessions, and one not expressed in the title or intimated there. It is just such a provision as would not attract attention, as would slip in unobserved by those who, looking to the title, considered it a merely local act, interesting to members from the city of New-York, and to them only. It is precisely within the mischief to remedy which the provision cited was put in the constitution, and its general nature cannot make the bill other than local or give effect to either a trick or a blunder which is a palpable fraud on both the law and the constitution. I consider it plainly unconstitutional as well as being in the teeth of all legal principles and all honest practices.

The discussion, which its existence has permitted in this case, I deem of much more consequence than any limited mischief it may do. And I am more than willing that the points taken should be followed out to a decision so authoritative as to settle the law of this state on questions so vitally important to the community. And I am gratified, that even by the means of such a section, full and free opportunity may be given to have any erroneous decisions.

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may have given corrected by higher tribunals and abler judgments; although, until they have been so corrected, and to the end that the correction may be as broad and clear as the error, I deem it not only proper for me, but my duty, to give my reasons for my acts, that both may be fully considered, and may stand or fall together, if indeed, they belong together.

Judgment affirmed.

SUPREME COURT. At Chambers, Erie, January, 1857. Before
T. R. Strong, Justice.

THE PEOPLE v. AUGUSTUS P. BEIGLER.

The jurisdiction conferred on the police justice of the city of Buffalo, by section thirty-five, chapter two hundred and thirty of the Session Laws of eighteen hundred and fifty-three, is only exclusive in respect to the other justices of said city, and does not take away the power of a coroner of the county of Erie to issue process, and to commit to prison under the provisions of the Revised Statutes.

Upon a question of bail before indictment on a charge of murder, where the accused, having been committed by the coroner, is brought before a justice of this court on *habeas corpus*, examinations before the coroner may and should be looked into, to ascertain whether a crime has been committed, and, if so, the strength of the proofs in support of it; and if such examinations show that the crime, if any, does not exceed the grade of manslaughter, and a fair doubt exists whether the defendant has committed any felony, bail should be taken.

On the 6th day of January, 1857, at the city of Buffalo, on the petition of the defendant, a writ of *habeas corpus* was allowed by the said justice, directed to the sheriff of the county of Erie, commanding him to have the body of the defendant, with the time and cause of the defendant's imprisonment, before said justice at the old court-house in said city, on the eighth day of said month. At the time and

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place specified for the return of the writ, the defendant was brought before the said justice by the sheriff, and the sheriff returned to the writ that he detained the defendant by virtue of a warrant of commitment, a copy whereof was annexed to the return, and the original was produced. The warrant purported to have been issued by S. E. S. H. Nott, a coroner of the county of Erie, on the 3d day of January, 1857; was directed to the sheriff, &c., of said county; and after reciting that the defendant had been charged, upon inquisition taken before said coroner, on the 23d day of December, 1856, on the oaths of six persons, naming them, with having, on the 19th of December, 1856, killed and murdered one Julia Rosendale and infant, at the city of Buffalo; that the defendant had been brought before the coroner to answer the charge; and that upon the examination on oath, in the presence of the defendant, of several persons, whose names were given, and on the examination of the defendant without oath, &c., it appeared that said crime had been committed, and that there was probable cause to believe the defendant guilty thereof, commanded the sheriff, &c., to convey and commit the defendant to jail, there to remain until he should be discharged by due course of law. The defendant made and presented an answer to the return, duly verified by his oath, denying that the coroner had any right, authority or jurisdiction to take the examination of the defendant, or to commit him to prison, for the reason, as the defendant was informed and believed, and therefore alleged, that the complaint was made to and before the coroner in the city of Buffalo; that the warrant for the appearance of the defendant was issued by the coroner in the city; and the examination of witnesses on the charge was conducted within the city; and that at said times the police justice of said city was not absent therefrom, and was able to hear the complaint and take the examination. The defendant further alleged in his answer that he was not guilty of the offence charged in the warrant, or of any other criminal offence. The inqui-

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sition referred to in the warrant of commitment, taken before the coroner, with the examination of witnesses sworn and examined on that occasion, and the subsequent examination of witnesses before the coroner upon the examination of the defendant, also referred to in the warrant, were produced for use on the hearing upon the return and answer to the writ of *habeas corpus*; and the hearing was then and there had.

E. Cook, for the defendant.

J. M. Humphrey (District Attorney), for the people.

T. R. STRONG, J.—The first question discussed at the hearing arises upon the denial by the defendant of the authority of the coroner to take the examination of the defendant upon his arrest upon the coroner's warrant, or to commit the defendant to prison. This denial of authority is based upon the assumption that the provisions of the Revised Statutes, in the article entitled "Of coroners' inquests" (2 R. S., 743, §§ 6, 7), declaring that if the jury find that any murder, manslaughter or assault has been committed, and the party charged with such offence be not in custody, "the coroner shall have power to issue process for his apprehension, in the same manner as justices of the peace;" and that "the coroner issuing such process shall have the same power to examine the defendant as is possessed by a justice of the peace, and shall, in all respects, proceed in like manner," as well as any common law authority which a coroner may possess in such a case, are, with certain exceptions not embracing the present case, abrogated, as to an examination and commitment of a defendant, by certain provisions in the charter of the city of Buffalo, relating to the powers of the police justice of that city. The latter provisions are to be found in *Laws of 1853* (496, §§ 35, 36). By section thirty-five, the police justice "shall have sole and exclusive jurisdic-

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tion in the city to hear complaints and take examinations in criminal cases, except as is otherwise provided by this act." By section thirty-six, "warrants for the arrest of persons charged with crime may be issued by any justice of the peace in the city, but shall be made returnable before the police justice. During the sickness, absence or inability of the police justice, or a vacancy in that office, they shall exercise in all criminal matters and proceedings the same power and jurisdiction, &c., as justices of the peace in towns." These sections manifestly were intended to relate only to justices of the peace of the city; and to confer upon the police justice sole and exclusive jurisdiction, for the purposes named, only in respect to the other justices of the city. The provision in section thirty-six, that warrants may be issued by any justice of the peace in the city, but shall be made returnable before the police justice, and the omission of a like provision for the return of their warrants as to coroners and other officers having power to issue warrants and take examinations in criminal cases, clearly show that it was the justices of the peace in the city, other than the police justice, whose powers were designed to be curtailed by the previous section, giving the police justice exclusive jurisdiction. If the position of the defendant was sound, those two sections would take away the general powers of the justices of this court, and of the county judge of the county of Erie, within the city of Buffalo, in respect to the examination of offenders and their commitment for trial, declared in 2 *Revised Statutes* (705, § 1), as well as those of coroners of that county. Indeed, all those officers would virtually be divested of all authority as to the arrest of offenders in that city, when there was a police justice able and ready to act, as they could not make their warrants returnable before the police justice, nor themselves proceed to take examinations, &c.

It is insisted, on the part of the defendant, that as the powers of coroners, by the statute, to examine defendants in the cases specified are the same as is possessed by justices of

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the peace, that their powers are to be measured by those of justices in the locality where coroners are called to act; but I think it is plain that the legislature intended, by the section declaring the powers of coroners, that they should be as full and ample as those of justices of the peace generally throughout the state.

If the coroner was not authorized to examine or commit, the defendant would not necessarily, as is conceded, be discharged. The *Revised Statutes* (vol. 2, p. 568, § 43) declare that if, on the return to a *habeas corpus*, the party imprisoned "appears by the testimony offered with the return, or upon the hearing thereof, to be guilty of a criminal offence, although the commitment be irregular, the court or officer before whom such party shall be brought shall proceed to let such party to bail, if the case be bailable and good bail be offered, or, if not, shall forthwith remand such party."

It is next made a point by the defendant's counsel, that upon the merits of the charge against the defendant there was not sufficient evidence to warrant the commitment, and he should therefore be set at liberty. The counsel contends that the merits of the case, as presented by the testimony taken before the coroner, may be reviewed on *habeas corpus*, and if, in my opinion, the charge against the defendant is not sufficiently proved, I may wholly discharge him. It is not necessary, in the view I take of the case, to decide whether the doctrine thus broadly stated can be sustained; for, assuming that it is correct, I am satisfied that upon the case made by the proofs an entire discharge of the defendant ought not to be granted. A brief general outline of the case, upon the testimony, may properly here be given. It is, that the deceased, Amelia Murr, lived at the house of the defendant, in Rochester, as a domestic, from about a year ago last September to about the following March; that she then went to Mrs. Moore's, of that city, a seamstress, the situation having been procured for her by the defendant; that she remained there until about September last, when

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she went to Buffalo and there remained up to her death, on the twenty-first of December; that for the entire period she was there the defendant visited her at intervals of about three or four weeks; that she was then pregnant; that while there she was called Rosendale; and the defendant was introduced to Mrs. Mercer, the woman with whom she boarded, as Doctor or Mr. Rosendale, her uncle; that he stated to Mrs. Mercer that the husband of the deceased was in California; that while the deceased was at Buffalo, the defendant frequently called at the house of her parents, in Rochester, and on one or more occasions represented to her mother that Amelia was married to Frederick Rosendale, whom he knew, and she was happy with him, and was in Erie; that in the evening of the nineteenth of December last, the deceased was left alone at her boarding-house, with the exception of a little child placed in her care for the evening, and was then in comfortable health for a woman in her condition, except she had a cough and complained of difficulty of breathing; that in the course of the evening the defendant called upon her, and they went together to the Railroad Hotel in Buffalo; that the defendant had, about four or five o'clock in the afternoon of that day, been to that hotel and engaged a room for himself and lady, or wife, who, he stated, was up at her friend's; that the defendant entered his name on the hotel register, "D. A. Biglow and lady;" that they occupied the room part of the night; that about twelve o'clock in the night the defendant came into the bar-room and said his wife was sick with the asthma and could not lie in bed; that subsequently he ordered a carriage to take her back to her friends; that she was taken to her boarding-house, and carried into the house, being unable to walk and in great pain; the defendant gave directions to have her made as comfortable as possible, also sending for a physician, and left some funds and promised to pay well for taking care of her; the defendant also directed Mrs. Mercer to write to him every

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other day as to her condition, and wrote his address and left it with Mrs. Mercer, being, "Mr. Frederick Rosendale, care of Dr. A. P. Biegler." The deceased suffered great pain, from difficulty of breathing and otherwise, until Sunday evening then next, when she was delivered of a child of about seven months' gestation, which was dead at delivery, and in less than an hour afterwards died. Several physicians, who were examined, testified to their having made a *post mortem* examination of the body of the deceased mother, and to appearances of the body and marks upon the child, indicating, in the opinion of some of them, the use of instruments before the child was delivered, and that the deaths of the mother and child proceeded from such a cause; others formed the opinion that the deaths were from natural causes. Various other circumstances on both sides of the case, having an important bearing upon the question of the guilt or innocence of the defendant, are disclosed by the testimony; but enough of the case has been stated for the purpose of this decision. It will be seen, I think, from this general view, that the defendant could not, with propriety, be unconditionally set at liberty.

The remaining question discussed before me is, whether the defendant should be admitted to bail. No doubt can exist in regard to my power to release him on bail; it is a question of sound judicial discretion whether that power shall be exercised, to be guided by adjudged cases. It is not necessary in this case to go into an extended examination of those cases. If the examinations taken, and which are before me, show that, although the defendant is charged with murder, his crime, if any, does not exceed the grade of manslaughter, and a fair doubt exists whether the defendant has committed any felony, I think they clearly require that bail should be taken. The general doctrine on this subject will be found fully stated in *The People v. McLeod* (1 *Hill*, 376); and notes to that case (3 *Hill*, 667, 672), in the extended and valuable notes there to be found, wherein

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are collected many of the cases; *The People v. Van Horne* (8 Barb., 158), and cases there cited; *The People v. Hyler and others* (2 Park. Cr. R., 570). All the cases agree that, upon the question of bail before indictment, examinations before the coroner may and should be looked into to ascertain whether a crime has been committed, and, if so, the strength of the proofs in support of it; and I have therefore, with that view, carefully read and considered the examinations in the present case, which are very voluminous. There is much in them calculated to excite the sensibilities; but it has been my earnest purpose throughout the investigation to act upon the case with coolness and deliberation, indulging, so far as I could properly do so, a presumption of innocence, and, so far as my action will affect his rights, to render to the defendant strict and impartial justice. He is entitled to the benefit of the law fairly administered, while he is responsible to the law for his conduct.

The Revised Statutes, in regard to murder (vol. 2, 656, § 4), provide that "the killing of a human being, without the authority of law, by poison, shooting, stabbing, or by any other means or in any other manner, is either murder, manslaughter, or excusable or justifiable homicide, according to the facts and circumstances of each case." By section five, "such killing, unless it be manslaughter, or excusable or justifiable homicide, as hereinafter provided, shall be murder in the following cases:

"First. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being.

"Second. When perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.

"Third. When perpetrated, without any design to effect death, by a person engaged in the commission of any felony."

Section nine of the Revised Statutes (2 R. S., 661), in regard to manslaughter, as originally passed, prescribed that

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"every person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall be deemed guilty of manslaughter in the second degree." This section was amended, in 1830, by inserting, between the word "shall" and the words "be deemed," the words "in case the death of such child or of such mother be thereby produced." In 1845 (*Laws of 1845*, 285) an act to punish the procurement of abortion and for other purposes was passed, which was amended the following year (*Laws of 1846*, 19), and which act, as amended, embraced the foregoing provision, extended somewhat by some additional words, and repeals section nine aforesaid. The provision, as it now stands, although not so declared in terms, is, and must be regarded, as virtually an amendment of the Revised Statutes, a substitute for section nine and occupying its place. This case does not call for a particular examination of the foregoing provisions; it is sufficient to observe, in respect to them, that if an offence be manslaughter by the Revised Statutes it cannot be murder, the language of section five in regard to murder being, that the killing, "*unless it be manslaughter*," &c., as hereinafter provided, shall be, in the cases specified, murder. (*Darry v. The People*, 2 *Park. Cr. R.*, 606; *The People v. Johnson*, 1 *Park. Cr. R.*, 29.)

The theory of the prosecution in this case is, that the death of the mother and the infant were occasioned by the employment of instruments to produce an abortion, which is the only one involving crime the evidence tends to sustain; and upon this theory, if a felony has been committed, it comes directly within the statute of 1846, above referred to, and is manslaughter only.

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Other reasons might be stated, showing that the crime, if any, does not exceed that of manslaughter, but that already given is sufficient.

It has already been stated that the depositions disclose a conflict of opinion between the physicians who were examined, in regard to the cause of the deaths; some attributing the deaths to the use of instruments, and others to natural causes. This conflict produces some doubt as to the defendant's guilt. The doubt is as to a crime having been committed, and not as to the author, if there has been a crime.

Without further extending this opinion, I will merely add, that on account of this doubt, in connection with the fact that the true grade of the offence, if one has been perpetrated, is not murder, but manslaughter, I have come to the conclusion, after much anxious consideration, that the case is within the established rule requiring bail to be taken.

I shall accordingly admit the defendant to bail, upon his executing a proper recognizance, with four sureties of sufficient ability, to be approved by me, in the penalty of \$12,000.

SUPREME COURT. Kings General Term, January, 1857. *S. B. Strong, Birdseye and Emott, Justices.*

THE PEOPLE *v.* JAMES B. CARYL.

On the trial of an indictment for an assault and battery, it appeared that the defendant was a conductor on a railroad, and that the act complained of was committed in forcibly ejecting a passenger from a car, before he had reached the station for which he had purchased his ticket, one ground of defence being that the passenger had conducted himself in a violent and disorderly manner, so as seriously to disquiet the other passengers, held that it was competent for the defendant to prove the passenger guilty of such misconduct during any part of his entire passage, it being a short one, and that it was erroneous to restrict the evidence to the last three miles of the passage.

It is erroneous to charge that a conductor on a railroad has no authority to eject a passenger from the car for misconduct, except when it is such as to disturb the peace and safety of the other passengers. Grossly profane or indecent language may be a sufficient ground for expulsion.

It is not competent on such a trial to give evidence, on the part of the prosecution, of the general temperance and sobriety of the passenger ejected. His conduct on the passage is alone in question.

Where, on the trial of such an indictment, it was one of the grounds of defence that the passenger improperly refused to surrender his ticket, when requested by the conductor to do so, it was held to be proper for the defendant to prove what was the regulation and custom of the company, as to the place of collecting tickets for the station to which the passenger was going. When the regulation of a railroad company, as to the place of collecting tickets from the passengers on a railroad, is a reasonable one, and a passenger refuses to comply with it, it is the right of the conductor to require the passenger to leave the cars, and, if he refuses to go, he may be ejected without unnecessary violence.

CERTIORARI to the Court of Sessions of Westchester County.

The defendant was indicted for an assault and battery, alleged to have been committed on one Thomas Elliott, and pleaded not guilty. The indictment was tried at the Westchester sessions, where the defendant was convicted.

On the trial, Thomas Elliott was called as a witness, and proved that he took passage on the New-York and Harlem railroad at the city of New-York for Tuckahoe, Westchester county, and purchased a ticket for that place; and that he was violently ejected from the cars at Hunt's Bridge, before

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reaching Tuckahoe, and nearly four miles distant therefrom; that just after leaving Williams' Bridge, a station three miles from Hunt's Bridge, the conductor called on Elliott for his ticket, which he refused to surrender up to him.

The defendant's counsel offered to show that Elliott's conduct throughout the whole trip was noisy, disgraceful and disorderly, and such as to annoy the passengers in the cars and to interfere with their repose and comfort. This testimony was objected to by the district attorney, and excluded by the court so far as it tended to show disorderly conduct before the arrival at Williams' Bridge, on the ground that conduct below that point could furnish no pretence to defendant to put Elliott out of the cars at Hunt's Bridge; to this decision the defendant excepted.

James Dusenbury, a witness for the prosecution, was asked by the district attorney to state what was Elliott's general character for sobriety. This was objected to by the defendant's counsel; but the objection was overruled, and an exception taken. The witness then testified that Elliott was a sober, quiet and inoffensive man.

The defendant offered to prove that the regulation and custom of the New-York and Harlem railroad had always been for the conductors to collect tickets, for all stations up to Tuckahoe, immediately after leaving Williams' Bridge. This was objected to by the district attorney, who claimed that such usage, if it existed, did not affect the complainant, nor deprive passengers, who insist on their legal right to a ticket, from retaining it until they reach the station next before leaving the cars. The court sustained the objection and excluded the evidence, and the defendant excepted.

The court, among other things, charged the jury that a conductor on a railroad had no authority to eject a passenger from the car for misconduct, except when the conduct of the passenger was such as to disturb the peace and safety of the other passengers in the cars, to which the defendant also excepted.

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The defendant made a bill of exceptions on which the writ of *certiorari* was issued.

Robert Cochran, for the defendant,

Cited 6 *Cowen*, 670; 1 *Starkie on Evidence*, 186; 5 *Cowen*, 320; *Angell on Carriers*, §§ 525, 530, b.; *Jenks v. Coleman*, (2 *Sumn.*, 22); *Commonwealth v. Power* (7 *Metc.*, 601); 1 *American Railroad Cases*, 389; *Statutes of 1850* (ch. 140, § 35); *Willeys v. The Buffalo and Niagara Railroad Company* (14 *Barb.*, 585).

Edward Wells (District Attorney), for the people,

Cited *Hollister v. Nowlen* (9 *Wend.*, 237); *Cole v. Goodwin* (*id.*, 254); *Roscoe's Criminal Evidence*, 96 (ed. of 1846); *General Railroad Act* (§ 34); *Wharton's Criminal Law* (311, 312).

By the Court, S. B. STRONG, P. J.—Whatever may be our opinion, from the evidence, as to the guilt or innocence of the defendant, we are bound to award him a new trial, if improper evidence was admitted against him, or competent evidence offered by him was rejected, or the court incorrectly ruled any question of law against him, at any rate in a matter material to his defence.

The defendant based his defence for forcibly ejecting the witness Elliott from the car upon two allegations: First. That he had conducted himself during the passage, and up to the time of his removal, in a violent and disorderly manner, so as to seriously disquiet the other passengers; and, Secondly. That he improperly refused to surrender his ticket when reasonably requested to do so.

As to the first ground of defence, the defendant's counsel offered to show that Elliott's conduct, throughout the whole trip, was noisy, disgraceful and disorderly, and such as to annoy the passengers in the cars and to interfere with their repose and comfort. The court refused to receive evidence

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of such misconduct antecedently to the arrival at Williams' Bridge, distant about three miles from Hunt's Station, where Elliott was ejected. Why this place was assumed as the limit does not appear. At any rate, it was improperly adopted. It was competent for the defendant to give evidence of misconduct during the entire passage, as it was a short one, if it was apparent that the disposition and feeling which prompted it continued and influenced Elliott's conduct up to the time of his removal. A slight ebullition of passion, or a trivial irregularity at the moment, might not have justified the expulsion. But if it was indicative of a continuance of previously outrageous conduct, justice to the other passengers, as well as to the railroad company, might have called for such a remedial measure.

The charge of the court, upon this point, was also too strong. It was that the conductor has no authority to eject a passenger from the car for misconduct, except when it is such as to disturb the peace and safety of the other passengers. According to this, a passenger cannot be removed for profane or indecent language, however gross it may be, or however it may offend the delicacy or sense of propriety of the other, and especially female, passengers. That is not reasonable, nor can it be law.

The court improperly rejected evidence to prove that the regulation and custom of the company had always been for the conductor to collect tickets, for all stations up to Tuckahoe (which was to be the terminus of Elliott's passage), immediately after leaving Williams' Bridge. That would have shown that the defendant was not influenced by any hostile motives when the ticket was demanded, and would, unless undue violence has been used, have justified his conduct, if the regulation had been a reasonable one; and whether it was or not would have been a proper question for the consideration of the jury.

If the regulation for the collection of the tickets is a reasonable one, and essential for the interests of the company,

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and a passenger refuses to comply with it, he may, I think, be required to leave the car, and, if he refuses to go, be ejected without unnecessary violence. He has no right to a seat in the cars, while refusing a compliance with a reasonable regulation of the proprietors. The charge of the court to the contrary was, I think, erroneous.

It was wrong, too, for the court to receive evidence of the general temperance and sobriety of the witness. His conduct on the passage in question was alone in issue.

The conviction should be set aside and a new trial granted.

SUPREME COURT. Broome General Term, January, 1857. Before
Gray, Mason and Balcom, Justices.

THE PEOPLE v. JOHN GOLDEN.

It is sufficient, in an indictment for petit larceny, charged as a second offence, to aver, generally, that the Court of Special Sessions, before which the defendant was convicted, had full and competent power and authority in the premises, without setting forth the particular facts showing jurisdiction. An omission, in such indictment, to state the facts which show jurisdiction, is only a formal defect, which is cured by the statute of *jeofails*, and is not available on demurrer.

WRIT of error to the Tioga County Sessions. The defendant was indicted for petit larceny, charged as a second offence. The indictment contained a general averment that the Court of Special Sessions, before which the defendant had been convicted, had jurisdiction, but omitted to state the particular facts showing jurisdiction. On demurrer to the indictment, judgment was given in favor of the defendant, and the people brought error to this court.

B. F. Tracy (District Attorney), for the people.

Davis & Walker, for the defendant.

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BALCOM, J.—The Revised Statutes contain a section which declares that: "No indictment shall be deemed invalid, nor shall the trial, judgment or other proceedings thereon be affected," by reason of several specified defects, omissions and imperfections; and the section concludes in these words, viz.: "by reason of any other defect or imperfection in matters of form, which shall not tend to the prejudice of the defendant." (2 R. S., 728, § 52, *subd.* 4.) And the Court of Appeals have held that the statements in an indictment against a person for a second offence of petit larceny, where the first conviction was obtained in a Court of Special Sessions, showing the charge made against him before the magistrate, and in what form, the issuing of the warrant by the magistrate for his apprehension, his arrest and being brought before the magistrate by virtue of the warrant, and his election to be tried before the magistrate for the offence charged in the warrant, pursuant to the provisions of the statute in such cases, are all matters of form; and that an indictment which contained only an allegation that the magistrate before whom the conviction for the first offence was had, possessed full power and authority to hold a Court of Special Sessions and try and convict the accused for such offence, and did convict him, was good. (*The People v. Powers*, 2 *Seld.*, 50.) The remarks in that case, that the objection to the indictment came too late to be available (being after the verdict was rendered against the accused), do not detract from the force of the decision as to what allegations in the indictment were matters of form. The decision of the Court of Appeals in that case shows that the defects in the indictment in this case, for which the Tioga Sessions pronounced it bad, are mere matters of form; and, as the defects could not and did not tend to the prejudice of the defendant, the indictment was valid, and it should have been sustained. (5 *Wend.*, 9; *Stevens v. The People*, 1 *Hill*, 261; 3 *Barb.*, 470; 7 *id.*, 462.)

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We are not at liberty to question the soundness of the decision of the Court of Appeals, on the question under consideration, even if we were inclined to do so.

The judgment of the Tioga Sessions, sustaining the demurrer to the first count in the indictment, should be reversed.

MASON, J.—This case comes before us on a writ of error to the Sessions of Tioga county. The defendant was indicted for petit larceny, charged as a second offence. The indictment averred generally that the Court of Special Sessions before which the defendant was convicted had full and competent power and authority in the premises to try and convict the defendant, but did not set forth the facts showing jurisdiction. The defendant demurred to the indictment for this omission to set forth the facts in the indictment to show the jurisdiction. The Court of Sessions ruled that the general averment of jurisdiction was not sufficient, and held the demurrer well taken and gave judgment for the defendant. Our statute declares that "*no indictment shall be deemed invalid, nor shall the trial, judgment or other proceeding thereon be affected,*" by reason of any defect or imperfection in matters of form which do not tend to the prejudice of the defendant. (2 R. S., 72, § 52.) The cases of *The People v. Phelps* (5 Wend., 10, 19) and *The People v. Treadway* (3 Barb., 470) are authorities in point, holding that this omission to state the facts which show jurisdiction is only a formal defect, which is cured by our statute of *jeofails*; in other words, that such particular averment, in pleading the judgment of a court of special and limited jurisdiction, is a mere matter of form in pleading, and does not tend to the prejudice of the prisoner. These cases were rightly decided; and I think that Judge Gridley did not properly consider the question in the latter case, or he would not have complainingly placed his decision upon the doctrine of *stare decisis*. He had been so long used to the familiar distinction in pleading, that as to a court of special and limited juris-

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diction the pleader must state facts showing jurisdiction, while in regard to a court of general jurisdiction a general averment of jurisdiction is held sufficient, that he has regarded the difference a substantive one in matter of fact, instead of an arbitrary rule of pleading. The courts have held that in pleading the judgments of courts of special and limited jurisdiction a more formal statement shall be required than in pleading the judgment of a court of general jurisdiction. Why is this? Certainly not because there is not the same substance in the averment in the one case that there is in the other; and were it not for a stubborn rule of pleading, which requires a formal statement of the facts in the one case and allows a general averment in the other, no one would doubt but that the trial of any question of jurisdiction could as well be had under a general averment of jurisdiction in regard to a court of special and limited jurisdiction as of a court of general jurisdiction. It is a mere matter of form, imposed by a rule of pleading, and nothing else. It says to the pleader: as to a court of general jurisdiction you may aver generally that the court had power and authority to render the judgment, but as to a court of limited jurisdiction you shall be required to make a formal statement of facts which establish jurisdiction. It is a mere matter of the form of pleading and nothing more; for whether the jurisdiction be averred generally or the facts establishing it be set forth with particularity, were this formal rule of pleading abolished, would make no difference. In that case, all evidence, either to impeach or sustain the jurisdiction, could just as well be admitted in the one case as in the other. I do not mean to say that this old rule of pleading is unwise because it required a more formal statement in regard to courts of limited jurisdiction, but only to show that the substantive issue is the same in either case, and that it is mere matter of form in pleading. The case of *The People v. Powers* (2 Seld., 50) is relied on by the counsel for the defendant as a decisive authority against the

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indictment in this case. I do not so understand that case. On the contrary, the court held expressly, in that case, just what I have held in this, that this defect is matter of form merely, and was cured by the statute. In that case, it is true, the objection was raised after verdict; but that makes no difference if it be matter of form merely, for the statute is as explicit that the indictment shall not be deemed invalid nor shall the trial thereon be affected by reason of any defect or imperfection in matters of form which shall not tend to the prejudice of the defendant. This statute is as effectual to cure formal defects in the indictment, before and upon the trial, as it is in regard to the judgment or other proceedings; and if the Court of Appeals, therefore, were right in the case of *The People v. Powers*, in holding the defect complained of a matter of form merely, then certainly the statute cures the defect in the indictment. It cannot be matter of substance before trial and matter of form after; for a substantive defect in a pleading cannot be cured so easily as that. (1 *Chitty's Pl.*, 712); and if it is a mere matter of form I do not see how the defect can possibly tend to the prejudice of the defendant.

The learned judge, in the case of *The People v. Powers*, was not sufficiently attentive as to the effect of this statute upon indictments before trial. He has stated the common law rule correctly and has decided the case correctly, but not having the question before him, as to the effect of this statute upon a defect of this kind in an indictment before trial, he has omitted to give any effect to this statute in its application to a defect of this kind before trial. The case, however, is not authority for the defendant.

The judgment of the Tioga Sessions, sustaining the demurrer to the first count in the indictment, must be reversed.

GRAY, J., concurred.

Judgment reversed.

SUPREME COURT. New-York General Term, February, 1857. *Roosevelt, Davies and Peabody*, Justices.

THE PEOPLE v. WILLIAM RANDO.

On the trial of an indictment for receiving stolen goods, knowing them to be stolen, it is competent for the prosecution to give in evidence a series of acts of the like character, for the purpose of showing the *scienter* of the accused, or to rebut any presumption of innocent mistake.

On the trial of such an indictment, it is not competent for the prisoner to prove what was said to the clerk of the defendant by the persons who delivered the stolen property to him, at the time of the delivery, on the premises of the defendant. *PEABODY, J.*, dissenting.

THE prisoner was indicted, tried and convicted, in the New-York General Sessions, for receiving a saddle, bridle and bits, the property of Baltis M. Segee, knowing the same to have been stolen.

The questions raised on the trial, and the exceptions taken by the prisoner's counsel, sufficiently appear in the points made on argument, and in the opinion of the court.

Henry L. Clinton, for the defendant.

I. The court below erred in admitting the testimony of Zerfass, Brandon, Neilson, Hamilton, Felheimer, Cummings, Kerr and Nesbitt, in respect to other stolen goods, stolen from other persons than Baltis M. Segee, the prosecutor, and at a different time. Specific exceptions were taken to each and every part of the evidence of the foregoing witnesses touching this point. The law on this subject is stated in *Archbold's Criminal Practice and Pleading*, 480 (*ed. with Wat. notes*), as follows: "But the prosecutor will not be allowed to prove that at the time his goods were found in the prisoner's possession, goods of other persons of the same description had also been found in his possession, which had previously been stolen; for that is not proof of guilty knowledge." Upon this point it is stated in 2 *Russell on*

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Crimes (p. 251): "Upon an indictment for receiving stolen goods, evidence may be given of different receipts of goods stolen from the same person in order to show guilty knowledge in the receiving, at least, of such receipts as were prior to the one charged in the indictment." The same doctrine is contained in 1 *Phillips' Evidence* (p. 475). All that is stated on this subject in *Russell, Wharton's American Criminal Law* and *Phillips' Evidence*, is wholly or chiefly founded on *The King v. Dunn and Smith* (1 *Moody C. C.*, 146). At page 149, it is stated: "But though this pledging, and disposing, and having in her possession the goods, extended over a great length of time, between four and five months, yet as all the property had been stolen from the same persons, and had all been brought to her by the prisoner Dunn, the learned judge thought it was admissible and proper to be left to the jury, as an ingredient to make out the guilty knowledge." It will be seen that in none of the elementary authorities or adjudicated cases has the doctrine ever been held, that property stolen from other persons than the prosecutor is competent evidence to prove the *scienter*.

II. The court below erred in not allowing the witness John Thompson to prove what was stated by the persons at the time they delivered the cart load of things upon Rando's premises in his absence, of which it was alleged the articles specified in the indictment formed part. The object of proving these statements was to show what representations induced Rando's clerk, in his absence and without his authority, to receive upon his (Rando's) premises these particular goods. This evidence was clearly competent on the question of *scienter*. The main circumstance existing against the defendant was the fact that the goods were found upon his premises, and thus, constructively at least, in his possession, so as to raise an inference unfavorable to his innocence, as in the case of an indictment for larceny, where the stolen property was found in the possession of

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the prisoner. Declarations made at the time of the delivery of the goods, by the persons delivering them, are clearly and palpably a part of the *res gestæ*, and as such admissible in evidence. "The principal points of attention are whether the circumstances and declarations offered in proof were cotemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character." (1 *Greenl. Ev.*, § 108.) "Declarations made at the time of the transaction, and expressive of its character, motive or object, are regarded as 'verbal acts, indicating a present purpose and intention,' and are therefore admitted in proof, like any other material facts." (*Ib.*) "The declarations must be concomitant with the principal act, and so connected with it as to be regarded as the mere result and consequence of the coexisting motives, in order to form a proper criterion for directing the judgment, which is to be formed upon the whole conduct." (*Id.*, § 110.) "Words and writing appear, perhaps, more properly to be admissible as a part of the *res gestæ*, when they accompany some act, the nature and object and motives of which are the subject of inquiry. In such cases words are receivable as original evidence, on the ground that what is said at the time affords legitimate, if not the best means of ascertaining the character of such equivocal acts as admit of explanation, from those indications of the mind which language affords." (1 *Phil. Ev.*, 194, 195.) "On a charge of larceny, when the proof against the prisoner is that the stolen property was found in his possession, it would be competent to show on behalf of the prisoner that a third person left the property in his care, saying that he would call for it again afterwards; for it is material in such a case to inquire under what circumstances the prisoner first had possession of the property." (*Rosc. Cr. Ev.*, 25.)

A. Oakey Hall (District Attorney), for the people.

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I. The ruling of the court, "that it was competent for the prosecution to prove that other stolen property than that belonging to prosecutor had been found in the prisoner's possession," was correct. 1. This ruling has been law *passim* ever since the case of *Dunn and Smith* (*Ryan & Moody C. C. R.*, 146 ; 1 *Gal.*, 842), which holds, "that where there are several distinct acts of receiving, evidence may be given of such receipts (at least, of all prior to that on which the prosecutor elects to proceed), for the purpose of proving the guilty knowledge in the receiving." (*See also the elaborate note by Waterman, in 3 Arch. Cr. Pr. and Pl.*, 477, 2 *Banks & Gould's ed.*) (1.) I find nothing to the contrary in any of the books. I never heard the doctrine questioned until this case, and I never read of its being doubted since that case of *People v. Trenor* (*Court of General Sessions, 1 City Hall Recorder*, 105.) In this case, Wilson, who was with Dr. Graham and Sampson (an illustrious triumvirate of ingenious defenders), objected to proof of any stolen articles received other than those laid in the indictment. The court said: "The defendant could not be found guilty of receiving stolen goods not laid in the indictment; nor does the public prosecutor offer the evidence for that purpose. He offers to produce it as a circumstance to be left to the jury." (2.) The reason of the rule is this: Receiving stolen goods is no crime of itself. There may be innocent purchasers, and very often there are. It is the knowledge they are stolen. If a man is in the practice of passing counterfeit money or of buying stolen goods, evidence of this rebuts any presumption of innocent possession or purchase, and raises affirmative presumption of guilty knowledge or *scienter*. (3.) So in case of *People v. Shotnell* (3 *City Hall Recorder*, 96), the report says: "It appeared that the defendant had been for a long time in the habit of receiving stolen goods of different kinds, &c."

II. The exceptions to exclusion of representations to defendant's clerk, in defendant's absence, &c., &c., is cer-

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tainly untenable. I am unaware of any exception to hearsay evidence that would vary the rule excluding it. To admit such evidence would be very dangerous. The artful representations of thieves, in collusion with a defendant, might, in this mode, be made evidence through the medium of an innocent agent of defendant.

By the Court, ROOSEVELT, J.—Where a party is indicted for the crime of knowingly receiving stolen goods, it is competent to the prosecution to give in evidence a series of other acts of the like character, to show the knowledge or *scienter* of the accused, or to rebut any presumption of innocent mistake.

It is not competent to the prisoner to introduce the allegations of the persons from whom he received the stolen goods. Such permission would lead to the fraudulent manufacture of evidence without the penalty of perjury.

The exceptions taken at the trial must therefore be overruled, and the proceedings of the General Sessions affirmed.

DAVIES, J., concurred.

PEABODY, J. (dissenting.)—I am unable to concur with my brethren in either of the points presented by this case. In admitting evidence that property stolen from persons other than the party mentioned in the indictment was found in possession of the accused, the court, I think, erred. The evidence seems exceptionable on several grounds. If offered to show the accused to be dishonest, and thus assail his character, it was clearly inadmissible, for the case was not in a situation to make evidence to that end proper. The prosecution could not make the issue of character, and the accused had not made it; until he had given evidence to sustain his character the prosecution could not assail it.

And where the issue of character is tendered by the accused, it can only be met by evidence of a general nature.

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Evidence of a solitary act like this is never admissible, even when proper evidence against character is so. No person can be supposed to come prepared for trial on a charge other than that embraced in the indictment. A general bad reputation is admissible when the accused has chosen to assert and give evidence of a good character, and thus tender an issue on that point; but in this case he had not done so; the evidence raised was not competent in either of these aspects.

But it was improper for a reason more palpable than either of them. In itself it did not show either a general bad character, or even a single act inconsistent with a good one; for it did not show nor attempt to show that the accused, having in his possession goods which had been stolen, had any knowledge of the manner in which they had been obtained. It failed therefore to connect him with the act by which they had been obtained. It seems to have been offered as evidence of guilty knowledge of the defendant as to the act charged in the indictment. To render evidence of another act proper at all for this purpose, it must be assumed that proof of guilty knowledge in one case is evidence of it in another, which is I think entirely inadmissible. But the evidence did not show the guilty knowledge even in that case to which it related, and stopped short of the point at which on any theory it could have been deemed admissible. The mere having in his possession goods which at some previous time had been the subject of a larceny of which he had no knowledge, was not at all inconsistent with his entire innocence in respect to them, and, admitting the evidence given to have been true, it does not show him guilty of any impropriety in respect to them. (*Arch. Cr. Pr. and Pl.*, 480, *ed. with Waterman's notes.*)

The indictment charges the defendant with having received one saddle, one bridle and some bits, goods stolen from one Segree, knowing them to have been stolen. On the trial, it appeared that the accused kept a feed store at 507, and a stable at 505 Houston-street.

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The prosecution proved that the stolen property was found on the premises of the accused.

The accused showed that it was brought there by three men in his absence, and the circumstances under which it was left there with his clerk or agent; and offered to show what was said on the subject between the men bringing it and his agent at the time. To this evidence the prosecution objected and the court excluded it.

The defence then put the question: "At the time these men left those things there, as you have stated, did they state for what purpose they wished to leave them?"

This question was also objected to by the prosecution and excluded by the court.

This evidence seems to me entirely competent. The declarations of the parties to the transaction at the time it took place, on the subject of it, and accompanying their acts at the time, would seem to be quite competent and likely to throw light upon it.

The crime charged is receiving with the guilty knowledge. The receiving is proved. There is no direct evidence of the *scienter*. The jury are asked to infer it. The circumstances of the receipt, the facts attending it, are shown. The statements or sayings of the parties to the act, respecting it, at the time it was done and accompanying it, are excluded. I can perceive no good reason for excluding them. Nothing could be more likely to unfold the nature of the act or give a character to it than those declarations. They are a part of the *res gesta*, and as such admissible.

The facts and circumstances attending the receipt are admitted in evidence, and the declarations of the parties accompanying those facts must be, or the case is left without evidence in its nature, as likely to explain and give a character to them as any which can well be imagined. They should be admitted, not as evidence of the truth of the facts stated, but as evidence that such statements were made,

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without regard to the truth or falsity of them. (1 *Greenl. Ev.*, § 110; *Phil. Ev.*, 194, 5; *Rosc. Cr. Ev.*, 25.)

The only reason urged against this evidence by the prosecution is, that it is hearsay, which might with equal propriety be urged against the testimony to prove a contract by an ear witness or one's declaration accompanying an act, explanatory. What better evidence can there be of the intent of parties to a transaction than their sayings or declarations in respect to it at the time they perform the acts relative to it?

The court erred in excluding this evidence, I think; and for each of the above reasons I am constrained to the opinion that a new trial should be ordered.

Proceedings affirmed. (a)

(a) At a subsequent general term in the same district, counsel in another case declining to argue a point similar to the one in this, relative to the declarations of parties having property which proved to be stolen, on the ground that the question was settled in this district, Mr. Justice Roosevelt, presiding, said that the case was one of much doubt, and had been decided by a divided court, and he for one preferred to consider the question an open one.

SUPREME COURT. Albany General Term, May, 1857. Before *W. B. Wright, Harris and Gould*, Justices.

THE PEOPLE *v.* JOHN CUMMINGS.

Since, by the Revised Statutes, a defendant in a criminal case is allowed to make a bill of exceptions, as in civil cases, and have the exceptions examined upon a writ of error, the practice of suspending judgment, to enable the court below to take the opinion of the Supreme Court upon questions raised on the trial, ought not to be encouraged.

It is no good cause of complaint, on the part of the defendant, that no precept was issued by the district attorney to the sheriff previous to the sitting of the Oyer and Terminer. Its omission, even if it is required to be issued, is not an irregularity of which anybody can take advantage. *Per HARRIS, J.*

No such precept is now necessary for a regular Court of Oyer and Terminer. *Per GOULD, J.*

The case of *McGuire v. The People* (2 Park. Cr. R., 148), reviewed. *Per GOULD, J.*

Where, at a stated term of a Court of Oyer and Terminer, an order was entered by direction of the court, adjourning the term until a future day, and also directing the sheriff to summon, "for the adjourned term of the court, sixty jurors (to be drawn in the usual way)," and, at the adjourned term, part of the number so drawn and summoned, and also a part of the panel which had been drawn and summoned for the regular term, appeared: and the jury which tried the cause was drawn from a box containing the names of both panels, and no objection was made to the regularity of the proceedings until after conviction, it was held, that though the proceeding was technically informal, in the direction given as to the drawing of the jurors, it furnished no good reason for setting aside the verdict or arresting judgment.

THE defendant, at an adjourned session of the Albany Oyer and Terminer, held in November, 1856, was tried and convicted of murder, before Mr. Justice Gould and the associate justices. No exceptions were taken upon the trial. The defendant's counsel, upon affidavits, moved, at the same term of the court, to set aside the verdict and grant a new trial, or to arrest the judgment on the ground that no precept had been issued by the district attorney to the sheriff, commanding him to summon the grand jury which found the indictment against the defendant, or the petit jury by whom he was tried; and also for irregularity in the order

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for additional jurors, and in drawing such jurors. The facts shown by the affidavits are substantially the same as those which appear in the clerk's return to the *certiorari* in the case of *McCann v. The People* (*supra*, p. 272). The Oyer and Terminer refused to set aside the verdict, but suspended sentence until the opinion of this court could be obtained upon the questions presented upon the motion.

H. Harris, for the people.

L. Tremain, for the defendant.

HARRIS, J.—Before the Revised Statutes went into operation, there was no such thing as a bill of exceptions in a criminal case. If a question arose upon the trial, in respect to which the court entertained doubt, it might suspend judgment until the advice of the Supreme Court should be obtained. Whether or not this should be done was a question entirely within the discretion of the court. When it was deemed proper thus to obtain the opinion of the Supreme Court, the questions upon which advice was sought were presented by a case agreed upon by the parties, or settled by the court. It was no uncommon thing to review the decisions of criminal courts in this mode. (*The People v. Vermilyea*, 6 Cow., 555.)

Since, by the Revised Statutes, the defendant has been allowed to make a bill of exceptions, as in civil cases, and to have the exceptions examined upon a writ of error, the former practice has for the most part fallen into disuse, although I believe there have been instances, since the adoption of the Revised Statutes, in which the advice of the Supreme Court has been thus sought. This is probably the first instance, however, in which sentence has been suspended for the purpose of taking the opinion of the Supreme Court upon questions of mere regularity, arising not upon the trial, but upon proceedings preliminary to the trial, and

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presented, not by a case, but upon affidavits read in the Court of Oyer and Terminer for the purpose of setting aside the verdict. Such a practice is not, in my judgment, to be recommended, for the reason that questions of mere regularity, in no way affecting the merits of the case, and nothing else, are presented for the consideration of this court.

But I proceed to consider the questions presented by the affidavits. The first is, that no precept was issued by the district attorney in conformity with the requirements of the statute on that subject. (2 R. S., 206, §§ 37, 38.) This question has already been examined in the case of *McCann v. The People*, just decided. If the requirement is to be regarded as at all applicable to stated terms of the Court of Oyer and Terminer, appointed and held in the manner prescribed by the provisions of the Code on that subject, it is merely directory; whether or not the precept is issued is a matter which does not concern the defendant, or, indeed, anybody else. The most that can be said of it is, that it is a venerable ceremony which has accidentally outlived its associates, and is as harmless in the breach as it is useless in the observance. Its omission is not an irregularity of which anybody can take advantage.

The second ground of irregularity upon which the defendant relies is, in the form of the order made by the court for summoning additional jurors. The stated term of the Oyer and Terminer was held on the third Monday of September. On the twenty-third of that month the court made an order adjourning the term until the tenth day of November, and also directing the sheriff to summon, "*for the adjourned term of the court*, sixty additional jurors, to be drawn by the clerk in the usual way." This order was obeyed; sixty jurors were drawn and summoned; at the adjourned term a part of the number so drawn and summoned, and also a part of the panel which had been drawn and summoned for the regular term in September, appeared. No objection was made to the regularity of the proceedings. The names of the

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jurors in both panels, and who were in attendance, were placed in the box by the clerk, and the jurors who composed the jury in this case, and in the case of *McCann*, who was tried at the same session, were drawn from both panels promiscuously.

It is undoubtedly true that the order in question was technically informal. Having determined to hold an adjourned session of the Court of Oyer and Terminer, it would have been competent for the court, pursuant to the twenty-fourth section of the Code, to direct that a panel of jurors be drawn and summoned as if such court were to be held by original appointment. But then such panel would consist of thirty-six jurors. This number might have been increased by an order of the judge, not the court, that additional jurors, not exceeding twenty-four, be drawn. (2 R. S., 417, §§ 41, 42.) Thus a judge, who is to hold a court for jury trials, may always, if he think fit, have a panel of sixty jurors drawn and summoned to attend such court.

But it is probable that the court intended to proceed under another provision of the statute, by which it was authorized to direct the sheriff to summon from the bystanders, or the county at large, so many persons, qualified to serve as jurors, as might be sufficient to form a jury. The informality consists in directing that the jurors to be summoned "be drawn by the clerk in the usual way," instead of directing that they be summoned from the county at large. It has been the uniform policy of the legislature to secure, in all cases, both grand and petit jurors possessing the requisite qualifications, and free from all suspicion of partiality or prejudice, by having them drawn by lot from the entire body of citizens liable to jury duty. For this, provision is made by statute in all practicable cases. The order in this case, though not in form authorized by the section of the statute under which it was made, is in conformity with the spirit of the law.

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In the case of *The People v. Colt* (3 Hill, 432) an order was made that the sheriff summon three hundred persons from the county at large. The sheriff selected the persons so to be summoned by copying their names from the jury list in the clerk's office. This was regarded as unobjectionable. Ordinarily, where jurors are to be summoned for the purpose of completing a panel, there is not time to have the jurors drawn. The sheriff is obliged, from the necessity of the case, to summon such as he can most readily find. The necessity of resorting to this mode of selecting a jury, in any case, has uniformly been deprecated. The jurors in this case were, as the statute requires, summoned "from the county at large," and the fact that the court directed that such jurors should be selected by lot from the whole body of qualified jurors, instead of allowing the officers by whom they were summoned to select them at pleasure, is not in my judgment such an irregularity as should, after a trial upon the merits, be allowed to affect the validity of the proceedings. I regard the irregularity, if such it may be called, as similar in effect to that of allowing a juror who does not possess the requisite qualifications to sit upon the trial without objection. This often happens, and yet no one ever imagined that it could be made the ground for setting aside a verdict.

I am unable to see anything in the proceedings which should prevent the Oyer and Terminer from proceeding to pass sentence according to the verdict of the jury.

GOULD, J.—In regard to the two points raised in this case, it is no doubt well to have the true rule understood, as following it will be a very easy matter whichever way it may be settled. And, first, is it true that there really was no regular jury attending the Oyer, by reason of the district attorney's not having issued the precept spoken of? (2 R. S., 271, §§ 43, 44, 3d ed.) It certainly has been so held in the case of *McGuire v. The People* (2 Park. Cr. R., 148), but

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that decision professes to be based chiefly, and for precedent in this state solely, on the case of *The People v. McKay* (18 John., 212), and it seems to me it is not sustained by the latter case.

It was said in the *McGuire case*, and is said in this, that the laws, both as to this precept and as to summoning jurors for the Oyer and Terminer, were the same when the *McKay* suit was decided as they are by the Revised Statutes, and that they continue the same under the Code. I am inclined to think, however, that neither position is strictly correct. The Revised Laws of 1813 (1 R. L., 326, § 6) provided that every *venire facias* for the trial of any issue, civil or criminal, should be awarded to the body of the county, &c.; and in section nine (*id.*, 327) it is prescribed that the writs of *venire facias juratores* shall contain a precise form of words, showing that a writ of *venire* was necessary to the summoning of any jury. And though section eleven (*id.*, 328) provides that, fourteen days prior to the sitting of any court of record, the names of the jurors for the trial of issues therein shall be drawn openly and publicly, without any *venire* previously issued, and goes on to direct the clerk to draw the names, substantially as by the Revised Statutes, and deliver a panel of such jurors to the sheriff, "whose duty it shall be to summon the persons whose names are contained in such panel, and to make return in what manner he has served such process," not that he should "return" the panel or make any return on the panel (^a), still, section four (*id.*, 326) says the sheriff shall return all writs, juries and certificates, together with the panels, and section fifteen (*id.*, 330) says the sheriff, "to whom any writ or process shall be directed for the trial of issues in said courts, shall annex a panel of the same jurors to all the said writs or process returnable at the same court." And in the next act (1 R.

(^a) By the present law the sheriff is bound to return this panel to the court, specifying on it who were summoned and how, so that now the technical return is on the panel (2 R. S., 511, § 80, 8d ed.); a total difference.

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L., 339, 340, § 16) it is said the sheriff shall cause to come before the Courts of Oyer and Terminer so many good and lawful men, to serve as jurors therein, as said courts or any justice thereof shall from time to time direct; and, in the same section, that the district attorney shall issue precepts, under the seal of the Supreme Court, directed to the sheriffs, commanding them to do what is by said section required of them; returning any panel not being one of the things "required of them" by said section.

It is on these statutes that Chief Justice Spencer gave the McKay decision, starting (18 *John.*, 216) with the clear rule that, at common law, a *venire* was necessary to authorize a sheriff to summon a jury, and holding (*id.*, 217) that, construing these statutes together, as neither authorized the summoning of a jury without some sealed process, the legislature did not intend to supersede the use of a *venire*, and did not call the panel ordered by the first statute "a process;" that "the process" which the sheriff was to return was the *venire*, under the seal of the Supreme Court, and that the only necessity of a *venire*, after those statutes, was to have the sheriff's return made on it, on this "process."^(a) And in the statement of the case for the prisoner (*id.*, 213) and the reporter's marginal abstract, it is expressly stated that "no *venire*" had been issued; the paper purporting to be a *venire* being without the seal of the court. The attorney-general (*id.*, 213) admits that "the *venire* in this case, being without seal, was void;" and in his argument (*id.*, 214) states the then practice to be that the panel, after the jurors named in it were summoned, was, by the clerk, annexed to any *venire* which might be returned, the practice varying from the law (1 *R. L.*, 330, § 15) only in this, that the clerk did what the sheriff was bound to do; thus showing, by the language of the court and of all parties that

(a) This reason has ceased (see previous note), and *cessante ratione, cessat et ipsa lex*.

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that case turned solely on the need of a *venire*, it being conceded that no *venire* was issued. It is nowhere stated in that case that the district attorney's precept was the unsealed *venire* of the case; and as a true, formal *venire* was provided for by the first statute, which is the only statute that provides for the drawing or names the panel, and as it appears from the case that a panel was drawn for the court that tried the cause, it cannot be safely asserted that the want of this precept controlled that case, or even that the precept was wanting.

So far, I have considered that case on its own citations, arguments and decision; but I would state a further point, not there called up, nor noted since in any case that I have seen. By the eleventh section (*id.*, 328) the clerk, at least fourteen days before the court, and without any *venire* previously issued, was bound to draw the jury; whereas, by the sixteenth section (*id.*, 340), the district attorney's precept was to be issued at least fifteen days before the court; so that this precept must be issued one day "previously" to the drawing; and yet no *venire* need be issued previously to the drawing. It can hardly be that the precept was the unsealed *venire* that was so fatal.

But, to compare these statutes with the present law: "It shall not be necessary, in any case, to issue or award any *venire* for the summoning of jurors to any Circuit Court, &c., except where a foreign jury is ordered." (2 R. S., 507, § 9, 3d ed.) (See note on page 348 for a sufficient reason; a technical "return" is now to be made on the panel.) And, —bearing in mind that Cummings was tried at an Oyer held at the same time and place as the Circuit,—it is said (2 R. S., 819, § 2, 3d ed.), in regard to issues of fact on any indictment, "such trials shall be had by jurors drawn, summoned and returned^(a) in the manner prescribed by law; and where

(a) Does the prisoner need two processes, that more than one return may be made? (See prior notes.)

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any Court of Oyer and Terminer shall be held at the same time with any Circuit Court, the jurors returned for such Circuit Court shall be the jurors for such Oyer and Terminer." And by the Code (§ 21) it is provided that "Circuit Courts and Courts of Oyer and Terminer shall be held at the same places and commenced on the same day;" so that it is not now necessary to issue any *venire* for a jury for any regular session of an Oyer and Terminer. And, to apply the present law to the *McKay* case, above cited, if the district attorney's precept was the *venire* there named, it is, by statute now, if not then, done away with for any regular Oyer and Terminer; if it was not that *venire*, then the case is no authority for the *McGuire* case, and the latter must rest on its own reasoning. Let us see how it stands, on that basis.

By sections forty-three and forty-four (2 R. S., 271, 3d ed.), section forty-one having provided for holding special Oyer and Terminers, the district attorney is ordered, before the time appointed for the holding of "such or any other Court of Oyer and Terminer," to issue a precept, tested, sealed, &c., directed to the sheriff, commanding him "to summon the several persons who shall have been drawn in his county, pursuant to law, to serve as grand and petit jurors at the said court, to appear thereat." And, to show who are, pursuant to law, drawn to serve at the said court, turn to the same volume (p. 509, § 24): "Fourteen days before the holding of any Circuit Court, or of any special Court of Oyer and Terminer, when no circuit is appointed to be held at the same time," the clerk of the county shall draw the names, &c., of "persons to serve as jurors at such court." And (p. 18, § 2; Code, § 21), at any regular Oyer and Terminer, held at the same time as a Circuit, the jurors of the Circuit, drawn and returned for it, are to be (not are drawn as) the jurors for the Oyer and Terminer. And it must also be borne in mind that the Code (§ 23), as well as the Revised Statutes (2 R. S., 271, § 41, 3d ed.), provides

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for holding special Courts of Oyer and Terminer, which are then held without any Circuit Court. Inasmuch, then, as no "other Court of Oyer and Terminer," than the "such" special ones as are provided for in said sections forty-one and twenty-three, can possibly be held, except at the same time and place as the Circuit; and as the Circuit jury is drawn for the Circuit only (*id.*, 509, § 24; 819, § 2), but is the jury for the regular Oyer and Terminer, it follows that now, under the Code (and the *McGuire case* is under the Code), the words "or any other" (§ 43), are utterly inoperative; and no such precept is necessary for any regular Oyer and Terminer.

To avoid what might thus seem the absurdity of those words (§ 43), it is but justice to say that, by section thirty-four (2 R. S., 270, 3d ed.), it is only provided that the regular Courts of Oyer and Terminer "may be held at the same time and place at which any Circuit Court may have been appointed to be held." So that, though the words "any other" could never have been strictly operative, to the requiring of the precept, there might, then, have been some other Courts of Oyer and Terminer, besides the special ones, for which the precept was necessary.

It is necessary to consider, next, whether the order of the Oyer and Terminer, to summon sixty additional jurors, was irregular and void. By section three (*id.*, 819), it is provided that whenever, for any reason, there shall not be the names of twenty-four jurors, then attending, in the box, the Court of Oyer and Terminer shall order the sheriff to summon, "from the bystanders, or from the county at large," so many qualified persons as shall be "necessary to make at least twenty-four jurors, from whom a jury for the trial of the indictment may be selected." There can be no controversy as to the number (sixty) ordered to be summoned, as the statute most certainly does not limit the number, except as to the minimum. For the benefit of the prisoner, to give him an opportunity of selection, so far as

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the rules allow it, or the fortune of the lot, there must be a full panel of twenty-four; but the maximum is discretionary with the court.

But at the end of this order are the words, "to be drawn by the clerk, in the usual way;" and this clause is claimed to vitiate, to make absolutely void, the prior portion of the order, acknowledged to be, without this clause, good. I will not now inquire into the merits of this point; though the affidavits on behalf of the prisoner show that he wished a chance, not for fair jurors, without any bias, but for "city jurors," in the unavowed, and hardly unavowed, hope that they would be biassed in his favor. At present, I will treat it technically. Even for this purpose, it is not necessary to refer to the prisoner's citation (*p.* 515, §§ 53, 54), as that by no means changes or interferes with the section already commented on (*id.*, 819, § 3); they are substantially the same, and section forty-one (*p.* 513) has nothing to do with this case, as that was not intended to be followed (2 *Park. Cr. R.*, 53) applying only to this forty-first section is not here applicable. To proceed then :

As the jury box from which these sixty jurors were actually drawn contained the names of all persons in the county who were both liable to serve and qualified for serving as such jurors, the order as it stands is to all intents and purposes coextensive with, legally synonymous with, an order to summon, in the very words of the statute, "from the county at large," and so far there is no error. Had the sheriff, on his own motion, procured the clerk to draw for him sixty names from the box, and then summoned the persons whose names were so drawn, there could be no pretence of any irregularity. (3 *Hill*, 434, 436, is directly in point.) But the order to draw them, it is said, took away the sheriff's discretion as to whom he should summon, and the prisoner is entitled to the benefit of that discretion.

Now, had the court verbally so directed the sheriff, there would, it is conceded, have been no error, as it would have

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been but advisory or directory, and the sheriff could have exercised his discretion in complying or refusing to comply with the direction. Is it anything more than directory now? The parts of the order are plainly separable, and on its face are separated; the words objected to being in a parenthesis, as if intended merely to assist the sheriff in an arduous duty. If this part were clearly void, the only necessary result was that the sheriff might disregard it, and comply with the part which was as clearly good. That he did comply with both parts is no more an avoidance of the good part, than, as above suggested, would have been his compliance with a verbal remark of the court, not in the order, or his drawing the names without either order or remark: compliance, this part not being valid, is a mere exercise of his discretion. Had the act done been illegal, an invalid order could not have made it legal; and the act done being legal (3 *Hill*, 434, 436), is it made illegal by an invalid order, or is the entire order made void by the doing, even nominally under it, of a perfectly legal act? If in any way under or against the order the sheriff had actually summoned them improperly, the array could be challenged; or if improper persons were summoned they could be objected to; but neither of these is alleged. The jury were but too fair, and too fairly summoned, to suit the emergencies of the case.

But I think that the further we look the stronger will be found the reasons for saying that these words had no effect on the preceding good order. I presume it will be conceded at once that if these words be, as an order, a mere nullity, binding no one, the prior parts of the order are not hurt thereby; as *utile per inutile non vitiatur*. And to prove them a mere nullity, two positions will suffice: First. The sheriff, in and of himself, had no control over the boxes of jurors' names, and no legal right to touch them; nor had the court, the Oyer, any right to order him to do so, or any power to help him to comply with such an order; Second. The clerk

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of the county, and he only, having any right to open or control these boxes, or to draw from them a single name, the court of Oyer and Terminer has no authority over them, as it can make no order, under any circumstances, directing the clerk of the county to draw a single name from either box. Clerks of counties are, *ex officio*, clerks of that court. (2 R. S., 272, § 50, 3d ed.) But that court has no control over them, except as clerks of the court. As clerks of the counties, they are in all their acts, as such clerks, officers independent of all courts, unless by statute provision. The action of county clerks in the ordinary drawings of jurors is not by the order of any court, but is a duty imposed by statute. (*Id.*, 509, § 24, 3d ed.) And though (*id.*, 513, § 41, 3d ed.) in a specified case and manner, a circuit judge may order additional jurors to be drawn, and so, by implication, can order it done in the only way in which jurors can by law be drawn, and thus may make an order which really binds the county clerk, as such, still, by no one else, and in no other way, and under no other circumstances, can the county clerk be ordered to draw a jury for such a court. The third section (*p.* 819) gives no power to order the clerk, even of the court, had he the power to do any such thing; and as before stated, this section, not section forty-one, was followed in this case. The words "to be drawn" &c., did no good, and did no hurt. Legally, they are not there; and the order remains good, to the sheriff, to summon sixty additional jurors. And whatever was actually done, purporting to be a drawing of additional jurors, was, on the part of the sheriff as well as of the clerk, a merely voluntary act, and not a duty imposed by any order. The sheriff has, in fact and in law, merely taken a means to help his discretion; and the sixty were talesmen, duly summoned as such.

Still further: were the prisoner technically right as to this order, I see no reason, even without any statute provision, and in a capital case where it is plain that no injury

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can have been done, why he should not be held to strict technicality, and be told that he has consented to the jury, with knowledge, or the means of knowledge at the clerk's desk, of the facts, and the time for him to be technical is past (2 *Park. Cr. R.*, 308); and as to any injuries being done by the organization of this jury, an examination of the case will show that what the prisoner complains of is really that the jurors were too impartial, and that his counsel "intended" to exhaust the regular panel, drawn in the way the law has carefully hedged in to insure competent, unbiassed jurors, "with the hope that out of the talesmen" to be summoned by the sheriff from the mere bystanders, in haste, and in unavoidable ignorance of their fitness, "there would be a fair proportion of city jurors;" but discovering so large a number of jurors in attendance he abandoned this hope of getting partial jurors. The affidavits of Myron, the clerk, and the district attorney show however that this abandonment of the plan was not wise, as there were but twenty-seven jurors in attendance, two of whom were excused from serving for cause, leaving but twenty-five; so that his twenty peremptory challenges would have left but five jurors, and seven might ordinarily be considered a fair proportion of twelve, to be summoned hastily and unadvisedly, for the purpose of not doing justice.

It appears further, by Morange's affidavit, that notice of the drawing of the sixty jurors was published "at least six days before the drawing," that being the legal time, in a city newspaper of large circulation, where and as the drawing of the regular panels was advertised; and the prisoner's affidavits show that, before the jury was impaneled, his counsel knew that this large number of additional jurors had been drawn, though he did not know the "precise terms of the order directing them to be drawn and summoned," while the district attorney's affidavit shows that the counsel inquired of several of the jurors for which court, September or the adjourned term, they were summoned.

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In all this is there any violation of legal principle, any matter of infringed rights, anything of possible prejudice or injustice to be found? any reason why, simply because the case is momentous in its issue, there should be indulged a straining after technicality to pronounce this jury improperly or illegally organized? All such cases are momentous to others than the accused. Public justice is involved in the matter. The whole people have interests to be prejudiced, and rights to be impaired, and life to be endangered, by any rule that, under cover of seeking the straightest technicality of law, subverts justice.

Beyond this there seems to me to be, to both the prisoner's points, a sufficient answer in the fullness of our statutes in regard to the class or kind of objections which shall be ineffectual at such a stage of a cause; since those statutes cover any defect or imperfection in matters of form, in either indictment or trial, which shall not tend to the prejudice of the defendant. (2 R. S., 519, 520, 813, 814, 3d ed.) And it is especially worthy of note that the statutes in force when the McKay suit was tried, not only do not cover this ground (1 R. L., 497, 13), but the statute of *jeo-fails* relating to civil suits, which is as broad as our present statutes last cited, contains a provision that it shall not extend to criminal cases (1 R. L., 122, § 11), which sufficiently accounts for that decision. This law was "revised" in 1829.

These latter citations of the statutes were not fully made or enforced to the court in the *McGuire case*, and that they were not there considered at all is plain, as no remark whatever is made on that point. Two years later, however, the general term in this district (2 Park. Cr. R., 308, 311) did hold a train of reasoning which fully sustains my position. And though the decision referred only to the manner of summoning the grand jury, the reasoning fully covers the case of the petit, and substantially holds the point I have just stated. This case also holds that even in capital

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cases, a prisoner, after trial, is too late to take a technical point as to a matter of mere form prior to the actual trial. (2 *Park. Cr. R.*, 308); and this part of that decision would preclude the prisoner from taking either of the points made in this case, each being, at most, a mere irregularity, working no injustice. (7 *Wend.*, 417, 428.)

In fact, as the case shows, the prisoner had an entirely unexceptionable, impartial jury, to whom he took no exception, and he must be bound by their verdict.

The Oyer and Terminer should proceed to sentence.

SUPREME COURT. Jefferson General Term, April, 1857. *Hubbard, Pratt, Bacon and W. F. Allen*, Justices.

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Under the act of congress, the county courts of the several counties of the State of New-York have jurisdiction of the naturalization of aliens. *Per* BACON, J. State courts, in entertaining jurisdiction of cases of naturalization, act exclusively under the laws of the United States, and should be deemed, *quoad hoc*, courts of the United States.

Willful false swearing, by a person giving material testimony in a naturalization proceeding, before a county court, is an offence against the laws of the United States, and punishable in the United States courts and not in the state courts.

Application for naturalization must be made in open court, and evidence of residence, &c., must be taken by the oral examination of witnesses and not by previously prepared affidavits. *Per* PRATT, J.

The question of jurisdiction of certain offences, as between the courts of the United States and the state courts, discussed by PRATT, J.

Form of an indictment for perjury, alleged to have been committed in a proceeding to obtain the naturalization of an alien, in a county court.

CERTIORARI to the Court of Oyer and Terminer of the county of Lewis.

The prisoner had been indicted for perjury, alleged to have been committed in the County Court of Lewis county

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on the naturalization of James Catillay. The indictment was as follows :

Lewis County, ss:

The jurors of the people of the State of New-York, in and for the body of the county of Lewis, to wit: (reciting the names of the jurors), good and lawful men of the said county of Lewis, then and there being sworn and charged to inquire for the people of the State of New-York, and for the body of the county of Lewis, do upon their oath present: That heretofore, to wit, on the twenty-seventh day of September, in the year of our Lord one thousand eight hundred and fifty-three, at a County Court of the said county of Lewis, holden at the court-house in Martinsburgh, in and for said county of Lewis, by and before the Honorable Francis Seger, then county judge of said county of Lewis and judge of said court, one James Catillay, who was then and there an alien and subject of the government of Germany, and not a citizen of the United States, made application to said court, and made and filed and presented his declaration in writing, and on oath in open court, of his intention to become a citizen of the United States in due form of law, and said County Court had full and perfect jurisdiction and authority over the subject matter of said application, and that the said James Catillay did then and there apply to and petition said court to be naturalized and to become a citizen of the United States, and that at the said County Court last aforesaid, which was a court of record, to wit, on the twenty-seventh day of September aforesaid, on said petition and application, it then and there became and was a material question whether the said James Catillay had then and there resided within the limits and under the jurisdiction of the United States for five years then last past, and whether the said James Catillay, for one year then last past, had resided within the State of New-York, and whether, during the same period, the said James Catil-

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lay had behaved himself as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same, and whether at the time the said James Catillay arrived in the United States, he had attained his eighteenth year; and the jurors aforesaid, upon their oath aforesaid, do further present, that Patrick Sweetman, late of the town of Croghan, heretofore, to wit, on the said twenty-seventh day of September, in the year of our Lord one thousand eight hundred and fifty-three, to wit, at said County Court, to wit, at Martinsburgh, in said county of Lewis, wickedly, maliciously, unlawfully and feloniously contriving and intending unjustly, fraudulently, feloniously and unlawfully to procure the naturalization of the said James Catillay, an alien as aforesaid, and to procure his admission as a citizen of the United States, came in his proper person before the said County Court, to wit, before the said Francis Seger, county judge as aforesaid, and then and there in open court produced a certain affidavit, in writing, of him, the said Patrick Sweetman, and then and there in open court, before Harrison Barnes, who was then and there county clerk of said county of Lewis, and clerk of said County Court, in due form of law was sworn and took his corporal oath upon the Holy Gospel of God, concerning the truth of the matter contained in the said affidavit, he the said Harrison Barnes, clerk as aforesaid, then and there having lawful and competent power and authority to administer the said oath to the said Patrick Sweetman in that behalf, and that the said Patrick Sweetman being so sworn as aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, then and there in open court, upon his oath aforesaid before the said Harrison Barnes, clerk as aforesaid, the said Harrison Barnes then and there having lawful and competent power and authority to administer the said oath to the said Patrick Sweetman in that behalf, falsely, corruptly,

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knowingly, willfully and maliciously, in and by his said affidavit in writing, did depose and swear, among other things, in substance and to the effect following, that is to say: that James Catillay, meaning the said James Catillay above mentioned, had resided within the limits and under the jurisdiction of the United States for five years then last past, and for one year then last past within the State of New-York, and that during the same period he had behaved himself as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same; and that at the time the said James Catillay arrived in the United States, he had not attained his eighteenth year, as in and by the said affidavit of the said Patrick Sweetman, filed in the county clerk's office of the said county of Lewis, more fully and at large appears, which affidavit is in the words and figures following, that is to say:

State of New-York, Lewis County, ss:

Patrick Sweetman, of said county, being duly sworn, doth depose and say: That he is a citizen of the United States; that he is well acquainted with the above named James Catillay; and that the said James Catillay has resided within the limits and under the jurisdiction of the United States for five years last past, and for one year last past within the State of New-York; and that during the same period he has behaved himself as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same. And he further saith, that at the time the said James Catillay arrived in the United States he had not attained his eighteenth year.

PATRICK SWEETMAN.

Sworn in open court, the 27th day }
 September, 1853, before me. }

H. BARNES, *Clerk*.

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Whereas, in truth and in fact, the said James Catillay, at the time the said Patrick Sweetman took his said oath and made his affidavit aforesaid, had no residence within the limits and under the jurisdiction of the United States for five years then last past, and for one year last past within the State of New-York; and whereas, in truth and in fact, the said James Catillay, during the same period, had not behaved himself as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same; and whereas, at the time the said James Catillay arrived in the United States he had attained his eighteenth year; and whereas, the same affidavit was in all respects utterly false and untrue at the time the said Patrick Sweetman so made and swore to the same; and whereas, the said Patrick Sweetman, at the time he so swore to and made the same, well knew the same to be utterly false and untrue; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said Patrick Sweetman, on the twenty-seventh day of September, in the year last aforesaid, to wit, at Martinsburgh, in the county aforesaid, at the said County Court aforesaid, in open court, which had full and competent jurisdiction over the subject matter of said application, before the said Harrison Barnes, clerk of said county and court as aforesaid (the said Harrison Barnes, clerk as aforesaid, then and there having such power and authority as aforesaid), by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, willfully and corruptly, did commit willful and corrupt perjury, to the great displeasure of Almighty God, in contempt of the people of the State of New-York, and their laws, to the evil and pernicious example of all others in like case offending, and against the peace of the people of the State of New-York and their dignity.

E. S. MERRILL,

District Attorney.

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The defendant pleaded not guilty, and was tried at a Court of Oyer and Terminer, held in Lewis county on the 18th and 19th days of December, 1856, before William J. Bacon, justice of the Supreme Court, and the justices of the Sessions. The defendant, by his counsel, moved to quash the indictment on the ground "That the County Court, being a court of limited and not having common law jurisdiction, had no power to grant certificates of citizenship or naturalization to aliens, and the affidavit set forth in said indictment was extra-judicial," which motion the said court denied, and the defendant's counsel excepted. A jury was then impaneled, and the prosecution, to sustain the indictment, called as a witness

James Catillay, who testified: I was born in Switzerland; I came to this country in June, 1853; landed in New-York May 25th, 1853; I arrived in Croghan, in Lewis county, June 4th, 1853; I know the defendant; he lives in Croghan; I became acquainted with him soon after I arrived there; we lived a short distance apart; I signed the paper shown me in three places and swore to it in this court room here; the defendant also signed it and swore to it here in this court room in my presence; Harrison Barnes swore defendant and myself to the affidavit.

The following is a copy of the paper referred to by the witness :

I, James Catillay, do declare on oath, that it is *bona fide* my intention, and has been for the last three years, to become a citizen of the United States, and to renounce forever all allegiance to all and every foreign prince, potentate, state or sovereignty whatever, and particularly to the government of Germany.

JAMES CATILLAY.

Sworn in open court this 27th day }
of September, 1853, before me. }

H. BARNES, *Clerk.*

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In the matter of James Catillay, on his naturalization :

State of New-York, Lewis County, ss :

James Catillay, being duly sworn, says : That for the continued term of five years last past, he has resided within the United States, without being at any time during the said five years, out of the territory of the United States, and that for one year last past he has resided within the State of New-York, and that at the time he so arrived in the United States he had not attained his eighteenth year.

JAMES CATILLAY.

Sworn in open court this 27th day }
of September, 1853, before me. }

H. BARNES, *Clerk.*

I, James Catillay, do solemnly swear that I will support the constitution of the United States, and that I do absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly to the government of Germany, of which I was a subject.

JAMES CATILLAY.

Sworn in open court this 27th day }
of September, 1853, before me. }

H. BARNES, *Clerk.*

State of New-York, Lewis County, ss :

Patrick Sweetman, of said county. being duly sworn, doth depose and say : That he is a citizen of the United States ; that he is well acquainted with the above named James Catillay, and that he, the said James Catillay, has resided within the limits and under the jurisdiction of the United States for five years last past, and for one year last past within the State of New-York, and that during the same period he has behaved himself as a man of good moral character, attached to the principles of the constitution of

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the United States, and well disposed to the good order and happiness of the same ; and he further saith that at the time the said James Catillay arrived in the United States he had not attained his eighteenth year.

PATRICK SWEETMAN.

Sworn in open court this 27th day }
of September, 1853, before me. }

H. BARNES, *Clerk.*

Joseph Catillay was then called as a witness, who, being duly sworn, testified : I am a brother of James Catillay, and came to this country with James ; we landed in New-York May 25, 1853 ; I arrived in Croghan, June 4th, 1853 ; am now a resident of Croghan, and know the defendant.

W. Hudson Stephens was then called as a witness, who, being duly sworn, testified : I know Harrison Barnes ; during the year 1853 he was the acting clerk in and for the county of Lewis ; the signatures in the foregoing paper, "H. Barnes," are his ; I know his handwriting.

Sidney Sylvester was then called as a witness, who, being duly sworn, testified : I am the clerk of the county of Lewis ; I hold the book of minutes of the Lewis County Court ; it shows a term of the Lewis County Court and Court of Sessions, September 27th, 1853 ; present Hon. Francis Seger, county judge, James R. Northrup and John Chickering, Esqrs., justices of sessions. The affidavits mentioned by the witness James Catillay I found on the files in my office.

It further appeared in the evidence that the county judge was sitting upon the bench, and engaged in his official duties at the time of the making and swearing to the paper mentioned in the testimony of James Catillay, in same room.

The affidavits were offered in evidence by the district attorney.

The defendant's counsel objected to their receipt on the ground "they were incompetent," and further that no foundation had been laid for their introduction, which objection

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was overruled by the court, and the defendant's counsel excepted.

The affidavits were then read in evidence. At the close of the evidence on the part of the prosecution, the defendant's counsel moved that the defendant be discharged on the following grounds :

First. That it appears that the affidavit of the defendant, if made at all, was made in the Lewis County Court, for the purpose of procuring the said James Catillay to be naturalized, and to receive a certificate of citizenship from said court ; that said court had no jurisdiction in the premises, and the pretended affidavit was therefore extra-judicial.

Second. It does not appear from such affidavits that they were made in proceedings in the Lewis County Court.

Third. That it does not appear that the person of the alien, mentioned in said indictments and in said affidavits, were one and the same : which motion was denied by the court, to which decision the defendant's counsel excepted.

After the close of the trial the defendant's counsel requested the court to charge that the clerk had no jurisdiction to naturalize, and that if the jury find that he assumed to entertain and act upon applications, and that of the said Catillay in particular, on the general authority of the court to act in court or out, that the affidavit in this case produced in evidence was extra-judicial.

The court, upon said request, charged that the clerk had no jurisdiction to naturalize, and that if the affidavit was in fact taken out of court, the oath was extra-judicial, and declined to charge otherwise on the remainder of the proposition.

The court further charged that, in order to sustain the allegation of perjury in this case, it was not necessary that the affidavit of the defendant should be submitted to the actual inspection of the court, but that the indictment was sustained if the jury should find that the oath was actually taken in the presence of the court, and while it was in open

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session, but if it was necessary to give effect to the oath, it would be presumed, in the absence of any proof to the contrary, that the court discharged its legal duty; to which ruling, and each and every part thereof, the counsel for defendant excepted. The jury rendered a verdict of guilty.

John Clarke, for the defendant.

I. The alleged perjury is not an offence against the laws of New-York, but only against those of the United States; by which the terms are prescribed on which a foreigner may become a citizen, not of the State of New-York, but of the United States. (*Dred Scott case.*) These terms are, that certain facts shall exist, and be proved before a Superior, or Circuit or District Court of a state, or Circuit or District Court of the United States; and by another section it is provided that "every Court of Record in any individual state, having common law jurisdiction, and a seal and clerk or prothonotary, shall be considered as a District Court within the meaning of the act, and every alien who may have been naturalized in any such court shall enjoy the same rights and privileges as if he had been naturalized in a District or Circuit Court of the United States." (*Act April 14, 1803.*) It is a law of the United States against which the offence is committed; it is committed in a court of the United States, made so by the act itself, having no authority except as such court. Hence, there can be no perjury in the case punishable by the state laws. Jurisdiction, even in the state court, in such case, is denied. (1 *Wheat.*, 330; *The United States v. Lathrop*, 17 *John.*, 4.) In these cases the court deny the authority of the state court to act at all under such delegated power; and in *ex parte Smith* (5 *Cow.*, 273), sustain only the powers of a magistrate to arrest and hold for examination, on the principle of national comity. These cases decided that, under the United States constitution, congress cannot vest any portion of the

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judicial power of the United States except in courts ordained and established by itself. (*Dudley v. Mayhew*, 3 Comst., 15.) State courts cannot take cognizance of a perjury committed in making an affidavit under an act of congress relative to the sale of public lands. (*The State v. Adams*, 4 Bl. Com., 146; 5 U. S. Dig., 250.) No state can pass naturalization laws. (*Chirac v. Chirac*, 2 Wheat., 259.) The false oath must be against the interests of the state. (*The State v. Dodd*, 3 Murphy, 226.)

II. The County Court is not a court of common law jurisdiction. Common law is defined to be "that which derives its force and authority from the universal consent and immemorial practice of the people." (2 Bouv. L. Dic., 9.) True, in the seventh article of amendments to the constitution of the United States, it is provided that "in suits at common law, where the value in controversy shall not exceed twenty dollars, the right of trial by jury shall be preserved;" and it is said the term in that place is used in contradistinction to equity, admiralty and maritime law. But common law jurisdiction, as applied to the courts which may naturalize, may, and probably does mean, original jurisdiction also. A mere appellate jurisdiction, confined to cases of appeal from Justices' Courts, and cases arising in such courts where title is in question, which is the only semblance of common law jurisdiction that court has, does not make it a court of common law jurisdiction within the meaning of this provision. The old Court of Errors was not, and certainly this court cannot arrogate to itself such jurisdiction. The decision in *Kundolf v. Thalheimer* (2 Kern., 593) is put upon this distinction, as remarked by one of the judges, "if common law actions are to be turned into special cases in this way," &c. The constitution provides that the County Court shall have such jurisdiction, in cases arising in Justices' Courts, and in special cases as the legislature may prescribe, but shall have no original civil jurisdiction, except in such special cases.

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III. As the legislature have not conferred the jurisdiction to naturalize aliens in the County Court, even if it could do so, there is for that reason no jurisdiction. It is not made one of the special cases. This would be conclusive, were it a subject of state law and jurisdiction. If it be not so, the court, *pro hac vice*, is a United States Court.

IV. The naturalization act requires the court to make a judicial examination of the applicant and his witnesses. It requires a trial by and before the court, on oath administered in open court. It does not contemplate or allow an affidavit as in this case. Here was no conformity, no hearing, no oath, no adjudication. The indictment is not based on any such proceeding; nor is any such proceeding proved. On the contrary, the indictment is based on an affidavit alone; and the proof is that such affidavit alone was made. It was inadmissible for any purpose. The court could not act upon it. (7 *Hill*, 137; 18 *Barb.*, 444.) The indictment must allege an examination on oath in open court. (*Copeland v. The State*, 24 *Miss.*, 257.) It must state that a question was presented to and for the adjudication of the court, and that evidence was duly given thereon. (*The State v. Moffat*, 7 *Humph.*, 250; *The State v. Wall*, 9 *Yerg.*, 349; *Smith v. The People*, 1 *Park. Cr. R.*, 317; *The People v. Restell*, 3 *Hill*, 304.)

Henry E. Turner (District Attorney), for the people.

I. By the act of congress of April 14, 1802, jurisdiction to naturalize is given to state Courts of Record having common law jurisdiction, with a seal and a clerk. County Courts of this state are Courts of Record, have a seal and a clerk, and possess common law jurisdiction sufficient to meet the requirements of the act of congress above mentioned (*Const. N. Y.*, art. 6, § 14; *id.*, art. 14, § 5): First. Because they have appellate jurisdiction over a large class of common law actions originating in Justices' Courts;

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Second. And exclusive jurisdiction over a common law action originating in a Justices' Court, where title comes in question, and also the right to issue executions on judgments obtained in Justices' Courts, over the amount of \$25, and docketed in said County Court, and control over the same; Third. Because, in their nature, organic structure, rules and practice, they are common law courts, and also exercise jurisdiction in a class of common law actions. (*Const. N. Y., art. 6, § 14; id., art. 14, § 5; 5 Barb., 169, 182; 11 id., 619; 17 id., 506; 2 Seld., 176; 2 Kern., 592; Code, § 596.*)

II. The case in 2 *Kernan* only rules that County Courts have not original jurisdiction in common law actions. It does not overrule the case of *Kundolf v. Thalheimer* (17 *Barb.*) by saying they have not common law jurisdiction of some kind within the meaning of the statute.

III. The affidavits of Catillay and Sweetman were properly offered in evidence, as a foundation had been laid for their introduction, and were properly made in the Lewis County Court.

IV. The oath having been duly administered, it is presumed that the proceedings were regular and that the court properly discharged its duty. (16 *Wend., 628; 6 Cranch, 176; 7 id., 420; 4 Peters, 393.*)

V. The offence of perjury is a common law offence, cognizable by the courts of the various states.

VI. Though it is an offence against the laws of the United States, yet, being committed in a state court, it is cognizable by both the federal and state courts.

VII. Offences against the United States are also, in many cases, offences against the several states, and are punishable by the state courts. (3 *Serg. & Rawle, 196; 11 id., 196; 8 Metc., 313; 2 Hill, 687; 3 Hamilton's Works, 265.*)

BACON, J.—The only questions which arise on this *certiorari* are, first, whether the County Court of Lewis county had power to naturalize the alien on whose applica-

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cation the perjury was alleged to have been committed; second, whether the courts of this state have jurisdiction to punish for a violation of what is claimed to be a law of the United States; or, in other words, whether the offence charged was not an offence against the laws of the United States and not the laws of New-York.

On the first point, I entertain no doubt that the County Court has jurisdiction to naturalize aliens. The act of Congress adopts every state court as its agent, to do this service, that is a court of record, and has a common law jurisdiction, and a seal and clerk.

The County Court possesses all these powers and functions. If it has common law jurisdiction, that is sufficient.

It has such exclusive jurisdiction in the common law action of trespass, commenced in a Justice Court, when title to land comes in question; and although this tribunal is shorn of much of its power by the constitution of 1846 and the decision of the Court of Appeals under it, I believe it is not yet divested of this power, not to speak of others which savor of common law.

The second objection, it seems to me, does not arise in this case. No such objection was taken, on the trial, and no motion to quash the indictment was made on that ground. The only defect of jurisdiction alleged was the want of power in the County Court to naturalize. If the objection can be entertained, I am sorry to say that I fear that it must prevail, and a case of gross criminality will go "unwhipped of justice."

The County Court acted as the agent of the government, and was, *pro hac vice*, a tribunal of the United States; and in *United States v. Lathrop* (17 John., 4) the Supreme Court of this state held that a state court has no jurisdiction of criminal offences against the United States. The offence being committed in a court of the United States was an offence which could only properly be charged, as is said by Platt, J., in his dissenting opinion, "as an offence commit-

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ted against the state, a sovereign whose courts sit in judgment on the offender" The cases cited by the counsel of the people do not uphold the doctrine put forth in the point made by him, but apply to quite a different state of facts.

I repeat that I regret to come to this conclusion, and shall be quite willing to yield my impressions to my brethren, if they come to a different result.

As at present advised, my opinion is that the conviction must be reversed.

PRATT, J.—An important question in this case (although not absolutely necessary to be considered) is raised upon the part of the defendant in regard to the jurisdiction of the state courts to try him for the crime charged against him in this judgment. The question to be considered is, whether the offence charged is one against the laws of the United States, or one against the laws of the state.

There are many crimes made punishable by the laws of the United States which are also made punishable by the laws of the state. In such cases it has been held that the state courts have jurisdiction of the crime. Forging the coin of the United States is an example of this class. As the constitution of the United States gives to congress an exclusive power to coin money and to regulate the value of the same, it would seem to follow that congress is vested with the power to make laws to prevent its being counterfeited. But this would not necessarily take away the power from the state to make the crime also punishable under its laws. And, when the crime is thus made punishable by state laws, it follows as a matter of course that the state courts have jurisdiction to enforce those laws (8 *Metc.*, 313; 9 *Ohio*, 133; 1 *Doug.*, 267; 2 *Const. R. S. C.*, 77; *Curt. Com. on the Const.*, § 133.)

There is another class of cases in which the state courts had jurisdiction before the adoption of the federal constitution, such as crimes punishable at common law. Though

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such crimes are brought under the cognizance of the federal courts by the constitution of the United States and the legislation of congress, yet, unless such jurisdiction is made exclusive by the terms of the constitution, or by the acts of congress, the state courts have concurrent jurisdiction to try them. (8 *Metc.*, 313; 12 *How.*, 284; *Curt. Com.*, § 121.)

There is still another class of cases where congress has attempted to vest in state courts jurisdiction of matters arising under the laws of congress. Interesting questions have arisen in cases of this kind, and there is a great conflict of judicial authority whether jurisdiction in the federal courts is not necessarily exclusive in such cases. The preponderance of authority, at least in the state courts, seems to be against the power of congress to confer such jurisdiction, especially when the remedy necessarily involves proceedings either by action or by indictment. (1 *Wheat.*, 336; 5 *id.*, 49; *Serg. Const. L.*, ch. 27; 17 *John*, 15; *Virg. Cas.*, 321; 7 *Conn.*, 239.)

There is another class of cases in which duties, judicial in their nature, have been conferred in special cases upon state magistrates and courts, which it has been held that they are not bound to discharge, but may or may not discharge them at their own option, such as the arrest and examination of persons charged with crime, the arrest of fugitives from service under the act of 1793, and various other cases not necessary to enumerate. (*Prigg v. Commonwealth*, 16 *Peters*, 531.) The naturalization laws confer powers upon state courts of substantially the same character; and, without attempting to examine the question in regard to the power of the federal government to confer such jurisdiction upon state courts and magistrates, it seems to me quite clear that, in entertaining such proceedings, they are exclusively under the laws of the United States and should be deemed, *quoad hoc*, courts of the United States. The crime, therefore, with which the prisoner was charged in the indictment was, in my opinion,

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a crime against the laws and sovereignty of the United States, and not against the laws and sovereignty of the state.

First. The subject of naturalization is exclusively within the jurisdiction of congress. The constitution confers upon congress the power to establish a uniform rule of naturalization, and, having passed laws establishing such rule, the states are excluded from interfering in any manner with the subject. (2 *Wheat.*, 269; 2 *Dal.*, 370; 3 *Wash. C. C. R.*, 313; 5 *Wheat.*, 49; 1 *Kent*, 426.

Second. The state courts, in entertaining these proceedings, are acting directly under the laws of the United States, and form a portion of the judicial agency of the federal government for carrying these laws into effect. They exercise in these proceedings no common law powers, but simply follow the express directions of the act of congress. (2 *U. S. Stat. at Large*, 154.) They should be deemed, therefore, as acting, in such proceedings, as courts of the United States; and such I presume would be the undoubted construction of the acts of magistrates in the examination of persons accused of crime, under the laws of the United States, or fugitives from service under the act of 1793; and yet there is no reason why the same rule should not apply to naturalization proceedings.

Third. These proceedings, being under the laws of the United States, and part of the necessary judicial agency provided by those laws for carrying them into effect, it would seem to follow that false swearing, by a person giving material testimony in those proceedings, must necessarily constitute an offence against the laws of the United States, and, if so, he must be punishable under the laws of the United States.

The prohibitions against perjury, in the statutes of our state, manifestly contemplate perjury in the state courts, or in proceedings before magistrates under the state laws, and not under the laws of another state. In *The State v. Adams* (4 *Blackf.*, 146) it was held "that if an affidavit

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be made under an act of congress, relative to the sale of public lands, and the party making it commit perjury, he may be punished under the act of congress prohibiting the offence, but the courts of the state had no jurisdiction." The statute of Indiana provides that "any person who willfully, corruptly and falsely makes an affidavit, &c., should be deemed guilty of perjury." (*Rev. Code* 1831, p 186.) This provision is quite as general as the provisions of our statute against the commission of perjury, yet the court in that case held that it was not an offence against the laws of that state.

It will be seen that perjury is made an offence by the laws of the United States, and that there is no reservation of jurisdiction in the state courts of that offence. It is provided by the act of 1790 (*ch.* 9) that "If any person shall willfully and corruptly commit perjury, on his or her oath or affirmation, in any suit or controversy, matter or cause, depending in any of the courts of the United States, or in any deposition taken pursuant to the laws of the United States, every person offending shall suffer," &c. By act of September 24, 1789 (*ch.* 20), exclusive jurisdiction is given to the Circuit Courts of the United States "of all crimes and offences cognizable under the laws of the United States, except when the act otherwise provides or the laws of the United States shall otherwise direct." I have found no statute of the United States conferring jurisdiction upon the state courts to punish for the crime of perjury, under the laws of Congress; although, by subsequent acts, this exclusive jurisdiction has been taken away in regard to some other crimes.

If I am right, therefore, in the position that the court, in these proceedings, is to be deemed a court of the United States, there can be no doubt but that the exclusive jurisdiction of the crime charged in the indictment in this case was in the federal courts, and that the Lewis County Oyer and Terminer had no jurisdiction of it.

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But, independent of the question of jurisdiction, I think the conviction should be reversed. The laws of Congress require the application to be made to the court, and the proof of five years' previous residence must be taken in open court. It must also be common law evidence, taken by the oral examination of the witness. Previously prepared affidavits are not competent. Such was the construction given to the act by this court in 7 *Hill* (137), and 18 *Barb.* (444). In this case there was no proof that any application was made to the court at all, or that the witness was ever sworn in open court, or that the court, in any manner, passed upon the matter. No presumption can be raised in favor of the regularity of the proceedings until it be proved that such proceedings were pending before the court. Until jurisdiction is shown, the presumptions are all the other way. It was therefore necessary to prove, in the first place, the pendency of the proceedings before that court. Before that was done there could be no presumption that the witness was examined orally, and his testimony afterwards put in the form of affidavits. Affidavits found on file were clearly not competent to prove the pendency of such proceedings, especially as there is no law requiring the examination to be taken in writing and filed; and, until the pendency of the proceedings is proved, the certificate of the clerk to these unauthorized affidavits does not prove anything. It is all in the nature of hearsay testimony.

The minutes of the court should have been produced, showing the pendency of the proceedings and the actual oral examination of the witness, before it was competent to show that his testimony was false.

I think, therefore, that the exception to the introduction of the affidavit was well taken, and the conviction, for this reason, should be reversed.

Conviction reversed.

SUPREME COURT. Dutchess General Term, April, 1857. *S. B. Strong, Birdseye and Emott, Justices.*

THE PEOPLE *v.* JEREMIAH BUTLER.

Under an indictment for manslaughter, in the common law form, the accused may be convicted of manslaughter, as defined in the Revised Statutes, in any degree, according to the evidence.

A conviction, by a Court of County Sessions, will not be reversed, on *certiorari*, on the ground that the jury erred on a question of fact.

In order to bring a case within the definition of manslaughter in the first degree, as defined in the Revised Statutes, it is necessary to show that the accused was committing or attempting to commit some other offence than that of intentional violence upon the person killed. (a)

Where, on the trial of an indictment, in the common law form, for manslaughter, the court charged the jury that if they were satisfied, from the evidence, that the deceased had come to her death by reason of blows or injuries inflicted upon her by the defendant, not in any self-defence, nor otherwise excusably or justifiably, they should find the defendant guilty of manslaughter in the first degree, the charge was held to be erroneous and the conviction was reversed.

Form of a writ of *certiorari* to remove a cause from a Court of Sessions of a county to the Supreme Court, after verdict and before judgment, pursuant to 2 Revised Statutes, 736, § 27.

THIS was a *certiorari* to the Court of Sessions of Kings county, in which the prisoner had been convicted of manslaughter in the first degree.

The writ of *certiorari* was as follows :

The People of the State of New-York to the Court of Sessions of Kings county, and to Samuel D. Morris, County Judge of said county, and John A. [L. s.] Emmons and Martense Schoonmaker, Justices of Sessions in and for said county :

We having been informed that one Jeremiah Butler was heretofore, to wit, on the nineteenth day of September, one thousand eight hundred and fifty-six, at a Court of Sessions

(a) Vide *Darry v. The People* (2 Park. Cr. R., 606, 684).

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held in and for said county, by and before the county judge and justices aforesaid, convicted of manslaughter in the first degree, and we being willing, for certain causes, to be certified of said conviction and of the indictment and judgment or verdict against said Jeremiah Butler, do command you that the said indictment, proceedings, judgment and verdict, with all things touching the same, by whatsoever name the parties may be called therein, you send to the justices of our Supreme Court, distinctly and plainly under your hands and seals, and that you cause this writ and the return thereto to be forthwith filed in the office of the clerk of said county of Kings, after the service of this writ.

Witness, Selah B. Strong, Esq., one of the justices of the Supreme Court, at the city hall, in the city of Brooklyn, this twenty-third day of January, one thousand eight hundred and fifty-seven.

JOHN G. SCHUMAKER,

District Attorney of Kings county.

WM. H. CAMPBELL, *Clerk.*

The indictment was as follows :

Kings County, ss :

The jurors of the people of the State of New-York, in and for the body of the county of Kings, upon their oath, present: That Jeremiah Butler, of the city of Brooklyn, in said county, on the sixth day of June, in the year one thousand eight hundred and fifty-six, at the city and in the county aforesaid, in and upon one Catharine Butler, in the peace of God and of the said people then and there being, feloniously and willfully did make an assault; and that the said Jeremiah Butler then and there, with the hands and feet of him the said Jeremiah Butler, her the said Catharine Butler, in and upon the head, neck, arms, body and vital parts of her the said Catharine Butler, feloniously and willfully did strike, beat and kick, giving her the said Catharine Butler, by such striking,

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beating and kicking as aforesaid, divers mortal wounds, bruises and contusions, in and upon the head, body and vital parts of her the said Catharine Butler, of which mortal wounds, bruises and contusions, she the said Catharine Butler, from the sixth day of June, in the year aforesaid, until the seventh day of June in the same year, at the city and in the county aforesaid, did languish, and languishing did live ; on which last mentioned day, in the year aforesaid, the said Catharine Butler, at the city and in the county aforesaid, of the mortal wounds, bruises and contusions aforesaid, did die.

And so the jurors aforesaid, upon their oaths aforesaid, do say, that he the said Jeremiah Butler, her the said Catharine Butler, in the manner and by the means aforesaid, feloniously and willfully did kill and slay, against the peace of the people of the State of New-York, and their dignity.

R. C. UNDERHILL,

District Attorney.

The defendant pleaded not guilty.

On the trial of the cause, in the Court of Sessions, several witnesses were examined, and, at the conclusion of the evidence, the court, among other things, instructed the jury that if they were satisfied from the evidence that the deceased came to her death by reason of blows or injuries inflicted upon her by the defendant, and that such blows were inflicted upon her not in self-defence, nor otherwise excusably or justifiably, they should, in that case, find the defendant guilty of manslaughter in the first degree.

To which instruction, and the whole thereof, the counsel for the defendant then and there duly excepted.

The counsel for the defendant then requested the court to instruct the jury :

1. That the allegations in the indictment do not amount to a charge of manslaughter in the first degree, or in any higher degree than the fourth degree ; and that if the jury

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should be satisfied from the evidence that the deceased came to her death by reason of blows or injuries inflicted upon her by the defendant, the jury could not, under the present indictment, convict the defendant of manslaughter in the first degree.

2. That, under the indictment, the defendant cannot be convicted of any higher or greater offence than manslaughter in the fourth degree.

3. That the evidence for the prosecution does not sustain an indictment for, and will not legally warrant a conviction for, manslaughter in the first degree.

To each of which requests the court declined to accede, and refused to charge the jury as requested; and to which decision and refusal the counsel for the defendant did then and there duly except.

The jury found the prisoner guilty of manslaughter in the first degree.

A bill of exceptions having been made, judgment was stayed to await the decision upon the writ of *certiorari*.

A. Hadden and *H. A. Moore*, for the prisoner, made the following points:

I. The court erred in instructing the jury that if the evidence showed that the deceased came to her death by reason of the injuries received from the defendant, it was manslaughter in the first degree, unless they were satisfied that the injuries were inflicted in self-defence, or excusably or justifiably. Such an instruction must have been based upon the assumption that such a case would fall within the sixth section of the statute, defining manslaughter, which provides that the "killing of a human being, without a design to effect death, by the act, procurement or culpable negligence of another, while such other is engaged in the perpetration of any crime or misdemeanor not amounting to

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felony, shall be deemed manslaughter in the first degree." But, in order to bring the case within this section, the crime or misdemeanor in the perpetration of which the killing was effected must be some crime or misdemeanor other than the act which was itself the cause of death: the act for doing which the party is indicted. (*The People v. Rector*, 19 *Wend.*, 569; *The People v. White*, 24 *Wend.*, 520.)

II. The court erred in refusing to charge the jury that the allegations in the indictment do not constitute a charge of manslaughter in the first degree, or any other than the fourth degree. The allegation of the indictment is, that the defendant, with his hands and feet, inflicted divers injuries upon the person of the deceased, which caused her death, without averring that it was while the defendant was engaged in the perpetration of any other offence, or in a cruel and unusual manner, or with a dangerous weapon, or in the commission of any other trespass or injury to private rights or property; so that if the first point be well taken, there is no other degree of manslaughter under which the indictment can be ranked than the fourth.

III. The court erred in refusing to charge the jury that the evidence would not warrant a conviction for manslaughter in the first degree. The evidence shows conclusively that if the deceased came to her death in consequence of injuries inflicted by the defendant, there is no reason whatever to suppose that the means employed were either cruel or unusual; while from the proved state of intoxication of the deceased, and the language used by the defendant, it is beyond reasonable doubt that the defendant must have been in the heat of passion; which state of facts is accurately and literally within the statute definition of manslaughter in the fourth degree. (2 *R. S.*, part 4, ch. 1, tit. 2, art. 1, § 18.) And, inasmuch as the killing of another by any weapon must involve a trespass and a misdemeanor, unless the killing be excusable homicide, if the facts in the case at bar constitute manslaughter in the first degree, the eighteenth section

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referred to can have no application to any conceivable state of facts.

J. G. Schumaker (District Attorney), for the people.

By the Court, S. B. STRONG, P. J.—The indictment in this case is in the common law form for manslaughter, without specifying any facts to designate the degree, under the provisions of the Revised Statutes. The counsel for the prisoner supposes that the omission is fatal to the validity of the indictment, or that at any rate it does not sufficiently charge the crime of manslaughter in the first degree, and that therefore the conviction in this case, which was for that offence, cannot be sustained.

It was decided by the Court for the Correction of Errors, in the case of *The People v. Enoch* (13 *Wend.*, 176), that the alteration in the Revised Statutes relative to what should constitute the crime of murder did not require any change in the form of the indictment. One reason why the indictment should not be changed from the common law form, urged by me on the argument of that cause, was the danger of an acquittal of a person proved to have committed the crime on the ground of variance, particularly when the means used must be conjectural. The danger was evinced in the subsequent case of *The People v. White*, where the indictment particularized the charge so as to bring it within one of the three specifications in the Revised Statutes, and the accused, who was found to have been guilty of the crime under another specification, escaped on the ground of variance. (24 *Wend.*, 540.) The principle on which the case of *The People v. Enoch* was decided is applicable to cases of manslaughter. The statutes do not expressly require any change in the form of the indictment, nor should there be any where it might facilitate the escape of criminals on technical grounds. Under the common law form, the pri-

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prisoner might be convicted of the offence in any degree according to the evidence.

The judge charged the jury that if they were satisfied from the evidence that the deceased had come to her death by reason of blows or injuries inflicted upon her, not in any self-defence, nor otherwise excusably or justifiably, they should find the defendant guilty of manslaughter in the first degree. It appeared, from the testimony of the physicians who conducted a *post mortem* examination, that a large superficial vein had been ruptured, causing effusion of blood on the brain, and that the death had resulted from the consequent compression of the brain. The defendant and the deceased, who was his wife, were both intoxicated, and had a violent quarrel in their room at a late hour in the evening, during which so much violence was used that the woman screamed several times, and their son, who was a small boy, exclaimed, "Pa. don't kill ma!" A lodger in the room immediately over the one occupied by them went into their apartment the next morning, where she found the deceased lying on the floor insensible. There was one cut on her head, which was bleeding, and there were bruises under her ear and on her head. The prisoner said: "Look here! this thing has fell out of bed and cut her head with a hair pin or some other damned thing." Two witnesses, one a cousin of the prisoner and the other not related to him, testified that they went to the room occupied by the prisoner and his wife at about nine o'clock the same evening; that the prisoner was absent but his wife was at home; that when first seen by them she was sitting in a chair; that, when addressed by one of them, she arose and advanced a step, then reeled and fell back on a stove; that they lifted her up and put her on a chair; that she bled from the back of her head, where one of those witnesses saw a cut; that they lifted her on the bed; that she did not speak, and they left her shortly afterwards, and before her husband returned. The physicians spoke of but one cut upon her head, and

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both supposed that the effusion of blood from that caused her death. It seems to me, from all this, that it is at least as natural to infer that the death was caused by the woman's intoxication and her fall upon the stove as that it was effected by the violence of her husband, and I am at a loss to discover anything which warranted the jury in their conclusion that the prisoner had killed his wife. However, we cannot reverse the judgment on the ground that the jury made a mistake on a question of fact. That this cannot be done, either by the court before which the trial was had or the tribunal to which the case might be carried on a bill of exceptions, was settled long ago, and we are not at liberty to overturn a rule as old as the common law itself without statutory authority. Others may attempt to do that, but we shall adhere to our own solemn determination, that the rule of the common law must prevail until it is abolished by our own laws. (*The People v. The Dutchess Oyer and Terminer*, 2 Barb., 282.)

The principal question in this case arises on the other exception taken by the counsel for the prisoner to that part of the charge of the court which I have above quoted. The court instructed the jury, in effect, that if the prisoner was guilty of any crime it was manslaughter in the first degree. The Revised Statutes (2 R. S., 661) provide that the killing of a human being, without a design to effect death, by the act, procurement or culpable negligence of any other, while such other is engaged: First. In the perpetration of any crime or misdemeanor not amounting to a felony; or, Second. In an attempt to perpetrate any such crime or misdemeanor, in cases where such killing would be murder at the common law, shall be deemed guilty of manslaughter in the first degree. If the prisoner killed his wife by violent means (and he must have done so, if at all), no doubt he was engaged in the perpetration of an assault and battery, which is a misdemeanor. But that was a part of the act itself which constituted the principal charge. The statute

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evidently contemplated some other misdemeanor than that which is an ingredient in the imputed offence, otherwise that part of it relating to an attempt to perpetrate a misdemeanor would be wholly nugatory. Where an act becomes criminal from the perpetration, or the attempt to perpetrate some other crime, it would seem that the lesser could not be a part of the greater offence. Derivative character must necessarily spring from a distinct, although it may be a connected source. I agree with Judge Bronson in thinking that, in order to bring a case within the definition of manslaughter in the first degree, it is necessary to show that the accused was committing, or attempting to commit, some other offence than that of intentional violence upon the person killed. (*The People v. Rector*, 19 *Wend.*, 605.) But the statute requires something more than the commission, or the attempt to commit, a crime or misdemeanor in order to constitute an undesigned killing of a human being manslaughter in the first degree. It must be under circumstances which would render the killing murder at the common law. Now, it was never the rule that the undesigned killing of a human being, in the heat of passion, excited by intoxication, by a violent assault and battery (and that was all that could be inferred from the evidence in this case) constituted the crime of murder. Something more was requisite. In order to constitute the crime of murder, where the killing is unpremeditated, and not by a person engaged in the commission of a felony, but simply by assaulting another, the beating must be in a cruel and unusual manner, as where a master corrected a servant with an iron bar, and a school-master stamped on his scholar in a tender part of his body, so that each of the sufferers died. In such cases the danger is so palpable that the act evinces a depraved mind, regardless of human life. There may be instances so strongly marked that the court may assume their character in its instructions to the jury. But they are very rare, and certainly this is not one of them. If the

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misdemeanor had been of that distinctive character which would have allowed the application of the provisions of the statute relative to manslaughter in the first degree to the transaction, it would still have been an important question whether the beating was in such a cruel and unusual manner as evinced a depraved mind, regardless of human life. That would have been a question of fact which should have been submitted to the jury with proper instructions as to the law, and should not have been, as it was, assumed by the court.

The conviction must be reversed and proceedings remitted for a new trial.

EMOTT, J., dissented.

Conviction reversed.

SUPREME COURT. At Chambers, Syracuse, May 9, 1857. Before
Pratt, Justice.

THE PEOPLE v. LANSING R. PUTNAM.

Under the act entitled "An act to suppress intemperance, and to regulate the sale of intoxicating liquors," passed April 16th, 1857, being intoxicated in any public place is a criminal offence: but it is not punishable summarily before a magistrate, unless the accused elects to be thus tried, the act having secured to him the right, in all cases, to give bail to appear before the next Court of Oyer and Terminer or Sessions, to be held in the county, and to be tried only upon indictment by a grand jury.

THE prisoner was arrested and brought before a justice of the peace, charged with having been found intoxicated in the public streets. His counsel claimed the right to give bail, and presented a recognizance with two sufficient sureties conditioned for his appearance at the next Onondaga Court of Sessions. The justice held that the statute required that

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the offence should be summarily disposed of, and refused to take bail. The prisoner's counsel thereupon sued out a writ of *habeas corpus* before the Hon. Daniel Pratt, justice of the Supreme Court, and the case was argued on the return setting forth the above stated facts.

John A. Clark, for the prisoner.

Henry S. Fuller (District Attorney), for the people.

PRATT, J.—The Maine law, as it is called, is repealed in express terms by the license law of the last session of the legislature. The prisoner, therefore, if punishable at all, must be punished by force of the last act, and by the method of procedure therein provided. The material inquiry, therefore, is to ascertain what method of procedure for the punishment of persons found intoxicated in public places is provided for in that act.

I may premise in the first place that there is no constitutional difficulty in the way of making this offence punishable summarily. That instrument provides that the right of trial by jury, in all cases in which it has heretofore been used, shall remain inviolate forever.

From the first organization of this state, and even while it was a colony, the higher crimes could only be tried by a common law jury of twelve men, and that upon presentment by indictment of a grand jury. There were certain crimes of the grade of misdemeanor which courts of special sessions had jurisdiction to try, provided the accused neglected, for a certain specified time, to give bail for his appearance at a Court of Oyer and Terminer or Sessions. By giving such bail, the accused could have the benefit of a trial by jury in all cases of misdemeanor. The constitution, therefore, secures to persons charged with misdemeanors the right of trial by jury thus qualified, and a provision of the Maine law depriving the accused of this right, and giving the magis-

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trate absolute power to try him summarily, was held by the Court of Appeals to be unconstitutional.

But there was always a class of persons or offenders, who, from the commencement of the government, have been accustomed to be dealt with summarily before inferior magistrates, and to whom the right of trial by jury has not been granted. These were classed under the heads of vagrants and disorderly persons. Among the latter, by the Revised Statutes, were classed drunkards. Persons found intoxicated in the public streets and places of the city might, therefore, well be classed in the same category, and provision be made for their summary conviction and punishment.

But the serious question is, does the license law now in existence make provision for such summary conviction and punishment? After a careful examination of the act, I have been unable to find any such provision.

The act contains no specific directions in regard to the trial before a magistrate of offences against its provisions. The sixteenth and seventeenth sections seem to contain the only provisions in relation to the procedure before the magistrate before whom the accused shall be brought. The sixteenth section makes it the duty of certain officers therein specified to arrest all persons found actually engaged in the commission of any offence in violation of the act, and forthwith carry them before any magistrate of the same city or town, who, on sufficient proof that such offence has been committed, unless such person shall elect to be tried before such magistrate, shall take a bond from the accused to appear at the next Court of Oyer and Terminer or Sessions to be held in the county, or commit him to jail to await the action of such court.

This section also makes it the duty of magistrates to entertain complaints of any violations of the act, and to issue warrants to bring the accused before them, making the same provisions for their trial as in the case of those arrested without process.

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The seventeenth section provides for the arrest of persons found intoxicated in public places, and for their examination before the magistrate, for the purpose, as it would seem, of ascertaining the cause of such intoxication, and who sold or gave to the accused the liquor; and the section adds, "such intoxication being hereby declared to be an offence against the provision of this act, punishable upon conviction by a fine of ten dollars and costs, at the same rate as in Court of Special Sessions," with imprisonment, not to exceed ten days, until paid.

There is no provision for summary trial and conviction, nor for any trial before the magistrate, except that contained in the sixteenth section. The twenty-ninth section makes it the duty of the courts to charge grand jurors to inquire into all offences against the provisions of the act, and to present all offending under the act for trial. The only reasonable conclusion would seem to be that as there is no provision in the act for the trial and conviction before the magistrate for offences against the provisions of the act, except when the accused shall elect to be thus tried, such offences can only be tried upon indictment in a Court of Oyer and Terminer or Sessions, except in case of an election by the accused to be tried by the magistrate.

This would seem to follow from the absence of affirmative provisions conferring upon the magistrate this power to try, and convict summarily, as there is no principle better settled than that courts and officers of inferior jurisdictions have no common law jurisdiction, but can exercise jurisdiction only in cases specially conferred upon them by statute. But in this act there seems to be more than mere absence of any provisions for the exercise of this power. The magistrate, as I construe the act, is, by express provision, excluded from trying the accused summarily, except he elects thus to be tried. By the seventeenth section, being intoxicated in a public place is made an offence against the provisions of the act; and, by section sixteen, persons proved to have com-

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mitted such offences, unless they elect to be tried before the magistrate before whom they are brought, are to give bail, or be committed to await the action of a grand jury.

In addition, the twentieth section makes it the duty of courts to charge grand jurors to inquire into all offences against the provisions of this act, and to present all offenders under the act. The precise expression is here used which is used in the seventeenth section, to define the crime of being intoxicated in a public place.

Taking these three sections together, it seems to me that the only fair construction of which they are susceptible is, that intoxication is to be dealt with in the same manner as other offences against the provisions of the act.

It is with deep regret that I feel forced to come to this conclusion, as I look upon this as one of the most important of the remedial portions of the act, provided the jurisdiction had been conferred upon the local magistrate of trying and convicting summarily for the offence. Without this power, much of the benefit and efficiency of such a provision cannot be realized.

The prisoner must therefore be discharged, on his executing the necessary bond.

SUPREME COURT. Kings General Term, May, 1857. *S. B. Strong*,
Birdseye and *Emott*, Justices.

THE PEOPLE *v.* JOSEPH JACKSON.

On the trial of an indictment for rape it is not competent, on the part of the defence, to prove acts of illicit sexual intercourse between the prosecutrix and persons other than the defendant, although the prosecutrix had previously been asked, on her cross-examination, in relation to such illicit acts, and had denied them (a). (This case overrules *The People v. Abbott*, 19 *Wend.*, 192.)

Form of an indictment for rape.

THIS was a *certiorari* to the Kings Oyer and Terminer, in which court the prisoner had been convicted, before S. B. Strong, one of the justices of this court, and Samuel D. Morris, county judge, and the justices of the Sessions.

The indictment was as follows :

Kings County, ss :

The jurors of the people of the State of New-York, in and for the county of Kings, upon their oath, present: That Joseph Jackson and John Dixon, now or late of the city of Brooklyn, in the county of Kings aforesaid, on the twenty-third day of August, in the year of our Lord one thousand eight hundred and fifty-six, at the town of Gravesend and in the county of Kings aforesaid, in and upon the body of Catharine Sullivan, a woman of the age of ten years and upwards, in the peace of God and of the said people, then and there being, with force and arms did feloniously make

(a) In favor of admitting such evidence, *vide The People v. Abbott* (19 *Wend.*, 192); *Rex v. Barker* (8 *Carr. & Payne*, 589); *Rex v. Martin* (5 *id.*, 562; 2 *Mood. & R.*, 512). Against it, *Rex v. Hodgson* (*Russ. & R. C. C.*, 211); *Rex v. Clark* (2 *Stark.*, 248); *Regina v. Clay* (8 *Cox C. C.*, 146); *The State v. Jefferson* (6 *Iredell*, 306); *Camp v. The State* (8 *Kelly*, 417); *Ross. Cr. Ev.*, 97, 97, 863; 3 *Greenl. Ev.*, 214; 1 *Phil. Ev.*, 176, 7 *Am. ed.*; 1 *Cow. & Hill's Notes*, 468, note 840; 1 *Stark. Ev.*, 700; 1 *Ch. Cr. L.*, 812; 1 *Russ. on Cr.*, 690.

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an assault, and her, the said Catharine Sullivan, did then and there, wickedly and feloniously and against her will, forcibly ravish and carnally and unlawfully know, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

R. C. UNDERHILL,
District Attorney.

The prisoner pleaded not guilty.

On the trial it appeared that Catharine Sullivan, the prosecutrix, embarked from Liverpool, on board the ship City of Brooklyn, for New-York, in July, 1856; that she arrived in New-York on or about the 20th day of August, 1856.

The said Catharine Sullivan was sworn and testified on behalf of the people. On her cross-examination, among other things, she was asked, by the counsel for the defendant, whether, during her passage from Liverpool to New-York, above stated, she had sexual intercourse with one Dr. Mason, a passenger on said ship, during said voyage, and she denied, in the most positive and unqualified terms, that she ever had sexual intercourse with said Dr. Mason.

During the progress of the trial, the counsel for the defence offered to prove particular acts of illicit sexual intercourse between the said prosecutrix and the said Dr. Mason, during the aforesaid voyage from Liverpool to New-York. The district attorney objected to any proof of particular acts of illicit intercourse between the prosecutrix and other persons, or any other person than the defendant. The court decided that the defence might prove the general bad character of the prosecutrix for chastity, but that evidence of particular acts of illicit intercourse between the prosecutrix and any other individual except the defendant could not be given in evidence. The court accordingly refused to allow the evi-

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dence to be given, to which said decision the counsel for the defendant excepted.

The jury found the prisoner guilty.

John G. Schumaker (District Attorney), for the people.

I. The defendant may give evidence of the prosecutrix's notoriously bad character for want of chastity, or that she had before been connected, with her consent, with defendant; but he cannot give evidence of any other particular facts to impeach her chastity. (*Regina v. Clay*, 5 Cox C. C., 146, 1851; *State v. Jefferson*, 6 Iredell, 305, 1846; *Rex v. Hodgson*, Russ. & Ry. C. C., 211; *Rex v. Clark*, 2 Stark., 243; *R. v. Barker*, 3 Carr. & Payne, 589; *R. v. Martin*, 6 id., 562; *Camp v. State*, 3 Kelly, 417; *Geo. R.*, 1847; *Jackson v. Lewis*, 13 John., 504.) 1. The Court of Errors have decided in the case of *Bakeman v. Rose* (18 Wend., 153, 154, 155), "That the credit of a witness should only be impeached by proof of his moral character generally, and not by proof of a particular immoral act." Senator Tracy says that "This principle is concurred in by all elementary writers upon evidence, and has been maintained by courts everywhere, in almost every variety of form in which it has been presented for their decision." 2. The witness, Catharine Sullivan, was asked in relation to a particular act of unchastity upon her cross-examination; and afterwards such particular act was offered to be proven by the defendant.

II. Any question answered by the girl Sullivan, on her cross-examination, in relation to any particular act touching her chastity, is immaterial to the issue and irrelevant, and her answer must be taken as conclusive. (*Stark. Ev.*, 146, 147, pt. 2; 1 *Phil. Ev.*, 229, ch. 7 and 8; *Swift's Ev.*, 143, 144.)

III. "The inquiry as to any particular immoral conduct is not admissible against a witness," is an old rule of law,

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and has been decided in this state, England, North Carolina, Georgia and Kentucky. Chief Justice Savage, in *Bakeman v. Rose* (14 *Wend.*), says: "That this point was expressly decided in this state twenty years before, in the case of *Jackson v. Lewis* (13 *John.*).” Chief Justice Thompson also says: "That such rule has not ever been departed from, and a discussion of it is unnecessary."

IV. The case of *The People v. Abbott* does not sustain the offer of the defendant to show particular acts. (*People v. Abbott*, 19 *Wend.*, 198.) The same question addressed to Mercy Foster, and ruled irrelevant and sustained by Justice Cowen, "to wit, as to immoral and improper intercourse between prosecutrix and prisoner," was the same question exactly put in this case to the witness Newell. A man is supposed capable of defending his general character, but cannot be prepared to defend himself against particular charges.

Alexander Hadden, for the prisoner,

Relied on *The People v. Abbott* (19 *Wend.*, 192).

By the Court, S. B. STRONG, J.—The defendant was tried at the Court of Oyer and Terminer held in the county of Kings on an indictment against him and another for a rape upon Catharine Sullivan. The trial occupied eight days, and resulted in his conviction. The complainant was asked, on her cross-examination by the counsel for the accused, whether upon her passage from Liverpool to New-York, previous to the alleged outrage, she had illicit sexual intercourse with a fellow passenger, to which she answered unhesitatingly that she had not. Subsequently the counsel for the accused offered to prove by another witness particular acts of such illicit sexual intercourse between the complainant and the same passenger during such voyage. The district attorney objected to the admission of the proposed evidence; and the

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court decided that the defendant might prove the general bad character of the prosecutrix for chastity, but that evidence of particular acts of unchaste conduct by her, with any person other than the accused, at any period previous to their intercourse, was inadmissible, and rejected the evidence as to such alleged acts offered in behalf of the accused, to which his counsel excepted. The only question raised by the bill of exceptions is whether this rejection of the proposed evidence was proper.

Although the prosecutrix in such cases is the person aggrieved, yet she is upon the trial simply a witness between the people and the accused, and the rules of evidence relative to ordinary witnesses are, with two exceptions resulting from the peculiarity of the complaint, which I shall presently notice, applicable to her. Generally the conduct of a witness in matters disconnected from the subject of the trial, being irrelevant, cannot be given in evidence. The objections to admitting such evidence are, that it raises collateral issues, and that the party against whom it may be offered would generally be taken by surprise, and not be prepared to meet it. It is very desirable that the inquiries upon a trial should be confined to the issues actually joined between the parties. They attend to try those only; the attention of the jury is or should be exclusively directed to them, and not diverted to other and irrelevant matters which have a tendency to confuse their minds, and an investigation into collateral matters would protract issues into inconvenient and intolerable length. The issues in civil cases, owing to modern innovations, are very numerous in most instances, and ought not to be increased by a relaxation of the rules of evidence. The system of special pleading which has been recently almost practically abolished, was admirably adapted to raise, and to confine the parties to a few specific and necessary issues. The consequence of the abandonment of that system in civil cases has been that legal investigations have become very burdensome to courts and juries, and there are

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numerous delays which in many instances operate disastrously to the ends of justice. Fortunately however, no essential changes in the modes of procedure in criminal cases have yet been adopted. The issue in those cases is simply whether the accused is guilty of the crime imputed to him in the indictment; whatever tends to prove his guilt or innocence is relevant, all else is foreign to the investigation and inadmissible.

If there should be anything to require the rejection of the proposed evidence, or to diminish the force of what is actually adduced, it may be proved, provided it does not raise or tender a collateral issue. Thus it may be proved that a proposed witness has been convicted of an infamous offence by producing the record. That raises no collateral issue of fact, as the record is conclusive, and there can be no further inquiry. But it is not competent to prove that the witness has in fact committed a crime if he has not been convicted, although the actual perpetration of the crime is what renders him unworthy of belief. That, if permitted, might raise a collateral issue for trial. So, too, a witness may be asked if he has not perpetrated some offence, or been guilty of some moral obliquity, which would if true impair the weight of his evidence. He may indeed refuse to answer whether he has been guilty of an act which would render him liable to an indictment or a prosecution for a penalty, or of any act disconnected with the main transaction which would have a tendency to degrade him. But he may confess either, at his option, and the evidence would be admissible. That would not, however, raise any issue for trial, as whatsoever his answer might be the party asking the question could not controvert it. A witness may also be asked whether he has previously made a varied or conflicting statement as to some material fact, and should he deny that, he might be contradicted. That would, however, have reference to a direct rather than a collateral issue. As to any discrepant statements of the witness in reference to matters foreign to the issue on trial,

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although he might be interrogated as to them for the purpose of estimating his credibility, yet the examiner would be precluded from controverting his answers.

There can be no doubt but that, in ordinary cases, an inquiry, addressed to any other than the assailed witness, as to any particular act derogatory to his character, or as to any specific blemish in his reputation, should be excluded. It was contended on the argument, however, that the rule had been relaxed in reference to the testimony of the prosecution in trials for rape, and in such cases the door had been opened sufficiently wide to admit the evidence offered and rejected in the court below. It is certainly right that the testimony of the female preferring the complaint should be subjected to the strictest scrutiny compatible with the due administration of justice; she is a necessary and generally the sole witness of the transaction. Experience has shown that the charge is frequently unfounded and instituted from impure motives. It is hard to meet the testimony of a cunning and unprincipled woman in reference to what is alleged to have taken place in the presence only of herself and of the accused, whose mouth is of course closed. It is therefore deemed essential that the charge should be supported by attending considerations or circumstances, such as that the witness is of good fame; that she presently disclosed the offence and made exertions for the detection and prosecution of the offender; that she exhibited marks and signs of the injury, and that the alleged outrage was perpetrated in a private or secluded place. It is absolutely necessary to the constitution of the offence that the outraged female should have resisted to the extent of her power until the crime was consummated, unless such resistance was prevented by threats and intimidation. As the complainants more frequently pervert the truth and are harder to be met in reference to this particular than as to any other allegation, courts have very properly allowed to the defendants considerable latitude in proving contradictory circumstances.

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They are permitted to prove that the general character of the prosecutrix for chastity is bad, or that she had previously had sexual intercourse with the accused. In either case, the probability of any considerable resistance would be very slight. No great injustice can result from these relaxations of the ordinary rules of evidence. If character is unjustly assailed it can ordinarily be readily fortified, and the accused would generally find it very difficult to support an unfounded allegation of sexual intercourse between himself and the complainant, and particularly when opposed to her positive oath; and besides, the public prosecutor might, when he should deem it necessary, make timely exertions to meet such grounds of defence. But the reasons for the admission and against the rejection of evidence as to the general character of the prosecutrix for chastity, and her illicit previous intercourse with the accused, are inapplicable to the proof of sexual intercourse between her and another, which was offered and rejected in this case. If the allowance by her of such intercourse resulted from general wantonness, her character in that respect would probably have been bad, and that could have been proved; at any rate, such would be the result in most cases, as the bad report is generally even with the evil practice; but if the complainant had yielded her virtue to the entreaties of one to whom she was attached and to whom she was engaged to be married, and if in this instance she yielded at all it was under such circumstances, I am not prepared to say that the incident would furnish any ground for an inference that she did not resist to the utmost an outrage from one who was comparatively a stranger to her. In any case, a single aberration from virtue, in one whose general character for chastity is otherwise unimpeachable, would raise so slight an inference, if any, of non-resistance to a brutal outrage from a person, or indeed any one except him to whom she had previously yielded, that it would not justify a departure from the ordinary rules of evidence. Besides, if proof of particular instances should

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be admissible, rebutting evidence would be allowable, and thus there might be one or more collateral issues to occupy the time and divert the attention of the jury. Such would be the evils if the prosecution could require previous and timely notice of the particulars of the intended attack upon the conduct of the complainant; but as no such notice can be exacted, there would be no means of meeting the evidence, often of the dissolute companions of the accused, however mistaken or corrupt it might be, and thus the character of an innocent and greatly abused female might be sacrificed, and the ends of public justice be defeated. The weight of authority is decidedly against the admissibility of such evidence. In *The King v. Hodgson* (*Russ. & Ry. Cr. Cas.*, 211) the prisoner's counsel offered a witness to prove that he had sexual intercourse with the complainant about a year before the charge, but Wood, B., who presided at the trial, rejected the evidence. Subsequently, the question as to the admissibility of such evidence was argued before the twelve judges of England, and it was decided by them, unanimously, on the 30th of January, 1812, that the objection to its reception had been properly allowed. In *The King v. Clark* (2 *Stark.*, 241) there was a trial on an indictment for an assault with an intent to commit a rape, before Holroyd, J. The learned judge said that, "in the case of an indictment for a rape, evidence that the woman had a bad character previous to the supposed commission of the offence is admissible, but the defendant cannot go into evidence of particular facts. This is the law upon an indictment for a rape."

Mr. Greenleaf, in his valuable work on evidence (3 *Greenlf. Ev.*, § 214), says: "The character of a prosecutrix, on a trial for rape, for chastity may also be impeached, but this must be done by general evidence of her reputation in that respect. Starkie (*Stark. Ev.*, part 4, 1269) says: "The character of the prosecutrix for chastity may be impeached by general evidence; but evidence of particular facts for this purpose is inadmissible." Phillips, in his work on evi-

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dence (*Phil. Ev.*, 222, 223, 3d ed.) says: "On an indictment for rape, the woman is not obliged to answer whether, on some former occasion, she had not a criminal connection with other men or with particular individuals, nor is evidence of such criminal intercourse admissible." Other authorities to the same effect are very numerous, and I consider the point to be well settled. It is true that Judge Cowen, in the case of *The People v. Abbott* (19 *Wend.*, 192), disapproves of the rule, strongly sustained as it is by numerous judicial decisions and the opinions of many elementary writers; but the point was not necessarily raised in that case, as the conviction was reversed on the ground that the Court of General Sessions, before which the trial for a rape had been conducted, had no jurisdiction of the case, and what was said by the learned judge as to the rejection of evidence was a mere *obiter dictum*.

As the proffered evidence in this case was properly rejected, the motion for a new trial must be denied, and the record must be remitted to the Court of Oyer and Terminer, with instructions to sentence the defendant conformably to his conviction.

Proceedings affirmed.

SUPREME COURT. Tioga General Term, May, 1857. *Gray, Mason, and Balcom, Justices.*

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Direct evidence is not, in all cases, indispensable for the purpose of proving the *corpus delicti*, on a trial for murder. BALCOM, J., dissenting.

The *dictum* of Lord Hale, in 2 *Hale P. C.*, 290, in which a contrary opinion is expressed, discussed and disapproved.

Where, on a trial for murder, there is no direct evidence of the *corpus delicti*, and it is evident that none can be adduced, the *corpus delicti* may be proved by circumstantial evidence, when it is so strong and intense as to produce the full certainty of death; but the death can be inferred, in such case, only from such strong and unequivocal circumstances as render it morally certain, and leave no ground for reasonable doubt. BALCOM, J., dissenting.

The cases bearing on this point reviewed, and the rules and principles of circumstantial evidence discussed.

On the trial of an indictment for murder, the law, in its clemency, presumes the entire innocence of the prisoner; and the government, before it has a right to ask for a conviction, is bound, not only to prove the alleged murder, but is required also to establish by evidence the guilt of the prisoner beyond a reasonable doubt. *Per Mason, J.*

The *corpus delicti* is made up of two things: First. The fact that a human being has been killed; and Secondly. The existence of criminal and human agency as to the cause of the death. *Per Mason, J.*

In proving the confessions of a prisoner, it is required that all the confessions be taken together, as well that which makes for the prisoner as that which makes against him; but it is not necessary to adopt the whole confession, where other evidence in the case proves part of the confession to be untrue. *Per Mason, J.*

Confessions of a prisoner are a doubtful species of evidence, and should be received with great caution. *Per Mason, J.*

No man can be convicted of a criminal offence upon his own confession alone that a crime has been committed; confessions are competent evidence in the case, but alone are not sufficient. *Per Mason, J.*

Charge of Judge Mason, on the trial at the circuit, of an indictment for murder.

Form of an indictment for the murder of an infant child, whose name and the manner of whose death were unknown, with counts in various forms to meet the circumstantial evidence on which the prosecution relied to prove the *corpus delicti*.

Where an impartial jury cannot be obtained in the county in which the indictment is found, the place of trial can be changed only by removing the indictment into the Supreme Court by *certiorari*, and then moving the Supreme Court to change the place of trial to some other county.

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Form of a writ of *certiorari* to remove an indictment before trial from the Oyer and Terminer to the Supreme Court.

Where an indictment has been removed into the Supreme Court by *certiorari*, before trial, it must be tried at a Circuit Court, like other issues pending in the Supreme Court, and not at the Oyer and Terminer-

THE prisoner was indicted in the county of Tompkins, for the murder of his infant daughter. The indictment was in the following form :

At a Court of Sessions, holden at the court-house in the town of Ithaca, in and for the county of Tompkins, on the second day of June, in the year one thousand eight hundred and fifty-six, before Honorable Samuel P. Wisner, county judge, and Clinton Bowker and William B. Speed, justices of the peace and members of said court, in and for the county of Tompkins :

The jurors of the people of the State of New-York, in and for the body of the county of Tompkins, to wit, &c., good and lawful men of said county, then and there being duly sworn and charged to inquire for the people of the State of New-York, and for the body of the county aforesaid, upon their oaths present: That Edward H. Ruloff, late of the town of Lansing, in said county of Tompkins, heretofore, to wit, on the twenty-third day of June, in the year of our Lord one thousand eight hundred and forty-five, at the town of Lansing in the county aforesaid, with force and arms, in and upon one — Ruloff, the infant daughter of said Edward H. Ruloff, whose christian name is to the jurors unknown, in the peace of God and the people of the State of New-York then and there being, feloniously, willfully, and of his malice aforethought, did make an assault; and that the said Edward H. Ruloff, with a certain knife of the value of six cents, which he, the said Edward H. Ruloff, in his right hand then and there had and held, the said — Ruloff, infant daughter of said Edward H. Ruloff, in and upon the left side, between the short ribs of

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her, the said — Ruloff, infant daughter of said Edward H. Ruloff, then and there feloniously, willfully, and of his malice aforethought, did strike and thrust, giving to the said — Ruloff, infant daughter of said Edward H. Ruloff, then and there with the knife aforesaid, in and upon the said left side, between the short ribs of her, the said — Ruloff, infant daughter of said Edward H. Ruloff, one mortal wound of the breadth of three inches, and of the depth of six inches; of which said mortal wound the said — Ruloff, infant daughter of said Edward H. Ruloff, from the said twenty-third day of June in the year aforesaid, until the twenty-fourth day of the same month, in the year aforesaid, did languish and languishing did live; on which said twenty-fourth day of June, in the year aforesaid, at the town aforesaid, in the county aforesaid, of the said mortal wound, said — Ruloff, infant daughter of said Edward H. Ruloff, died, and so the jurors aforesaid, upon their oath aforesaid, do say, that the said Edward H. Ruloff, the said — Ruloff, infant daughter of said Edward H. Ruloff, in manner and form aforesaid, feloniously, willfully, and of his malice aforethought, did kill and murder, against the peace of the people of the State of New-York, and their dignity.

And the jurors aforesaid, upon their oaths aforesaid, do further present: That Edward H. Ruloff, late of the town of Lansing, in said county of Tompkins heretofore, to wit, on the twenty-fourth day of June, in the year of our Lord one thousand eight hundred and forty-five, with force and arms, at the town of Lansing in the county aforesaid, in and upon one — Ruloff, the infant daughter of said Edward H. Ruloff, whose christian name is to the jurors unknown, in the peace of God and of the people of the State of New-York then and there being, feloniously, willfully, and of his malice aforethought, did make an assault; and that the said Edward H. Ruloff, with both his hands and feet, the said — Ruloff, infant daughter

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of said Edward H. Ruloff, to and against the ground, then and there feloniously, willfully, and of his malice aforethought, did cast and throw; and that the said Edward H. Ruloff, with both the hands and feet of him, the said Edward H. Ruloff, then and there, and whilst the said — Ruloff, infant daughter of said Edward H. Ruloff, was so lying upon the ground, the said — Ruloff, infant daughter of said Edward H. Ruloff, in and upon the head, stomach, back and sides of her, the said — Ruloff, infant daughter of said Edward H. Ruloff, then and there, feloniously, willfully, and of his malice aforethought, did strike, beat and kick, giving to the said — Ruloff, infant daughter of said Edward H. Ruloff, then and there, as well by the casting and throwing of her, the said — Ruloff, infant daughter of said Edward H. Ruloff, to the ground as aforesaid, as also by striking, beating and kicking the said — Ruloff, infant daughter of said Edward H. Ruloff, in and upon the head, stomach, back and sides of her, the said — Ruloff, infant daughter of said Edward H. Ruloff, with both the hands and feet of him, the said Edward H. Ruloff, in manner aforesaid, several mortal bruises, in and upon the head, stomach, back and sides of her, the said — Ruloff, infant daughter of said Edward H. Ruloff, of which said several mortal bruises she, the said — Ruloff, infant daughter of the said Edward H. Ruloff, then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said Edward H. Ruloff, in manner and form aforesaid, feloniously, willfully, and of his malice aforethought, did kill and murder against the peace of the people of the State of New-York and their dignity.

And the jurors aforesaid, upon their oaths aforesaid, do further present: That Edward H. Ruloff, late of the town of Lansing, in said county of Tompkins, heretofore, to wit, on the twenty-fourth day of June, in the year of our Lord one thousand eight hundred and forty-five, with force and

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arms, at the town of Lansing in the county aforesaid, in and upon — Rulloff, the infant daughter of said Edward H. Rulloff, whose christian name is to the jurors unknown, in the peace of God and of the people of the State of New-York then and there being, feloniously, willfully and of his malice aforethought, did make an assault; and that the said Edward H. Rulloff, a certain silk handkerchief, of the value of one dollar, about the neck of her, the said — Rulloff, infant daughter of said Edward H. Rulloff, then and there, feloniously, willfully and of his malice aforethought, did fix, tie and fasten; and that the said Edward H. Rulloff, with the silk handkerchief aforesaid, her, the said — Rulloff, infant daughter of said Edward H. Rulloff, then and there, feloniously, willfully and of his malice aforethought, did choke, suffocate and strangle; of which said choking, suffocation and strangling, she, the said — Rulloff, infant daughter of said Edward H. Rulloff, then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said Edward H. Rulloff, the said — Rulloff, infant daughter of said Edward H. Rulloff, in manner and form aforesaid, feloniously, willfully and of his malice aforethought, did kill and murder, against the peace of the people of the State of New-York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That Edward H. Rulloff, late of the town of Lansing, in the county of Tompkins, laborer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil, and of his malice aforethought, wickedly contriving and intending one — Rulloff, the infant daughter of said Edward H. Rulloff, whose christian name is to the jurors unknown, with poison, willfully, feloniously, and of his malice aforethought, to kill and murder, on the twenty-third day of June, in the year of our Lord one thousand eight hundred and forty-five, with force and arms, at the town aforesaid, in the county aforesaid, feloniously, willfully and of his malice aforethought, a large quan-

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tity of a certain deadly poison called arsenic, to wit, the quantity of two drachms of the said arsenic did put, mix, and mingle into and with a certain quantity of milk, which the said — Ruloff, infant daughter of said Edward H. Ruloff, was then and there about to drink (the said Edward H. Ruloff then and there well knowing that the said — Ruloff, infant daughter of said Edward H. Ruloff, intended and was then about to drink the said milk, and the said Edward H. Ruloff then and there also well knowing the said arsenic, so as aforesaid by him put, mixed and mingled into and with the said milk, to be a deadly poison); and the said — Ruloff, infant daughter of said Edward H. Ruloff, afterwards, to wit, on the day and year aforesaid, at the town aforesaid, in the county aforesaid, did take, drink and swallow down a large quantity, to wit, half a pint of the said milk with which the said arsenic was so mixed and mingled by the said Edward H. Ruloff, as aforesaid (she, the said — Ruloff, infant daughter of said Edward H. Ruloff, at the time she so took, drank and swallowed down the said milk, not knowing there was any arsenic, or any other poisonous or hurtful ingredient mixed or mingled with the said drink), by means whereof she, the said — Ruloff, infant daughter of said Edward H. Ruloff, then and there became sick and greatly distempered in her body; and the said — Ruloff, infant daughter of said Edward H. Ruloff, of the poison aforesaid, so by her taken, drank and swallowed down as aforesaid, and of the sickness occasioned thereby, from the said twenty-third day of June in the year last aforesaid, until the twenty-fourth day of the same month in the same year, at the town aforesaid, in the county aforesaid, did languish, and languishing did live; on which said twenty-fourth day of June, in the year aforesaid, at the town aforesaid, in the county aforesaid, the said — Ruloff, infant daughter of said Edward H. Ruloff, of the said poison died; and so the jurors aforesaid, upon their oaths aforesaid, do say, that the said Edward H. Ruloff, the said — Ruloff,

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infant daughter of said Edward H. Ruloff, in manner and form aforesaid, feloniously, willfully and of his malice aforethought, did kill and murder, against the peace of the people of the State of New-York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That Edward H. Ruloff, late of the town of Lansing, in the county of Tompkins, laborer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the twenty-third day of June, in the year of our Lord one thousand eight hundred and forty-five, with force and arms, at the town aforesaid, in the county aforesaid, in and upon one — Ruloff, infant daughter of said Edward H. Ruloff, whose christian name is to the jurors unknown, in the peace of God and of the people of the State of New-York then and there being, feloniously, willfully and of his malice aforethought, did make an assault; and that the said Edward H. Ruloff, with a certain weapon, to the jurors aforesaid unknown, of the value of six cents, which he, the said Edward H. Ruloff, in his right hand then and there had and held, the said — Ruloff, infant daughter of said Edward H. Ruloff, in and upon the left side of the head, then and there, feloniously, willfully and of his malice aforethought, did strike and thrust, giving to the said — Ruloff, infant daughter of said Edward H. Ruloff, then and there, with the weapon aforesaid, in and upon the said left side of the head, one mortal wound, of which said mortal wound the said — Ruloff, infant daughter of said Edward H. Ruloff, from the said twenty-third day of June in the year aforesaid, until the twenty-fourth day of the same month, in the year aforesaid, at the town aforesaid, in the county aforesaid, did languish, and languishing did live; on which said twenty-fourth day of June, in the year aforesaid, the said — Ruloff, infant daughter of said Edward H. Ruloff, at the town aforesaid, in the county aforesaid, of the said mortal wound died; and so the jurors aforesaid, upon their oath aforesaid, do say,

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that the said Edward H. Ruloff, the said — Ruloff, the infant daughter of said Edward H. Ruloff, whose christian name is to the jurors unknown, in manner and form aforesaid, feloniously, willfully and of his malice aforethought, did kill and murder, against the peace of the people of the State of New-York, and their dignity.

J. A. WILLIAMS, *Dist. Att'y.*

To this indictment the prisoner pleaded not guilty. The counsel for the prisoner claiming that an impartial trial could not be had in the county of Tompkins, sued out a writ of *certiorari* in the following form :

The People of the state of New-York to our justice and judges assigned to hold our Court of Oyer and Terminer in and for our county of Tompkins, and to every one of them Greeting :

We being willing, for certain reasons, that all and singular the indictments, records and proceedings whereof Edward H. Ruloff stands indicted before you, be determined before our Supreme Court and not elsewhere, do command you and every one of you that you or one of you do send under your seals or under the seal of one of you, before our said Supreme Court forthwith, at Ithaca, in the county of Tompkins, all and singular the said indictments, records and proceedings, with all things touching the same by whatsoever name the said Edward H. Ruloff is called in the same, together with this writ, that we may further cause to be done therein what of right and according to law we shall see fit to be done.

Witness, William H. Shankland, Justice, at Ithaca, August
[L. s.] twenty-first, one thousand eight hundred and fifty-six.

CHARLES G. DAY, *Clerk.*

Allowed, this 21st day of }
August, 1856. }

W. H. SHANKLAND, *Justice of the Supreme Court.*

Boardman & Finch, defendant's attorneys.

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On application to the Supreme Court, it appearing that an impartial trial could not be obtained in the county of Tompkins, because of opinions already formed by the jurors upon the question of the prisoner's guilt, an order was made that the indictment be tried in the county of Tioga. The cause came on to trial at the Tioga Circuit, before the Hon. Charles Mason one of the justices of the Supreme Court, on the 28th day of October 1856.

The counsel for the prosecution in opening the cause to the court and jury stated in detail the facts and circumstances he expected to prove and should rely upon to establish the guilt of the defendant, and on which the jury would be asked to find the death of the infant daughter, and that she was murdered by the defendant. And in answer to an inquiry made by the defendant's counsel, he stated that he did not expect or propose to prove by any direct evidence that the infant daughter was dead or had been murdered, or that her dead body had ever been found or seen by any one; but that from the lapse of time since the child and her mother, the defendant's wife, had been last seen on the 23d day of June, 1845, and from the other facts and circumstances he had stated in the opening, he should ask the jury to infer and presume and find that the infant daughter was dead, and that she was murdered by the defendant.

Hereupon the counsel for the defendant moved and insisted that the court should arrest the further progress of the trial for the want of proof of the *corpus delicti*; that the rule laid down by Lord Hale, that "no person should be convicted of murder or manslaughter unless the fact were proved to be done, or at least the body found dead," is the rule universally acted upon by our courts, and should never be departed from.

The presiding justice decided that the most judicious disposition of the question now raised was to reserve it until the close of the evidence, that he might see what would be proved.

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The counsel for the defence then called and had sworn, *Ephraim Schutt*, who testified as follows: I live in the town of Dryden; I lived there in 1843 and 1845; I had a sister by the name of Harriet, who was afterwards Mrs. Ruloff; my father's family lived in that town; first knew the defendant in May, 1842; he said he came from New Brunswick; said he was a German; spent part of the summer there; he was engaged on the canal at the time; the next winter he taught school; my sisters Jane and Harriet attended his school; the summer following he studied medicine, and afterwards practiced it; he married my sister Harriet the last day of December, 1843; that marriage was not much opposed by the family; the first winter they spent mostly at my father's.

Did they live happily together? Objected to; objection overruled. Defendant excepted.

There was some difficulty between them, but I never witnessed any; I once heard her crying in a room; went into the room; they were all there together; I asked him (Ruloff) why he treated his wife so; he made no particular reply; I said to him his conduct was very strange, and asked him if he could not conduct himself in a different manner, and if his wife was not agreeable, to leave her to us, but otherwise to stay; he finally concluded to stay; this was in the winter following their marriage; don't know of any other interviews in which there was difficulty.

William H. Schutt sworn: I am a brother of last witness; I never was present at any difficulties between him and his wife; some six months after his marriage I talked with defendant; he had left his wife once or twice; he said he disliked Dr. Bull and couldn't bear to have him near his wife; complained that Dr. B. had kissed his wife; Bull was his wife's cousin; this was their first meeting after the marriage; this conversation was on our way to Ithaca; he said he didn't think his wife had any intercourse with Dr. B., but he hated him; at another time he said (the same eve-

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ning) pretty much the same thing as before; he then said he thought Dr. Bull and his wife had had intercourse together: said he thought he should leave her; that evening he thought he would go back to her; was present when Dr. Bull made his first visit to Mrs. Ruloff; my sister Jane was present; my wife was present; think Dr. Bull kissed them all around.

Cross-examined. I lived at Ithaca; had lived there from January 1, 1844, with my family; this was my second or third visit after my marriage; I was married the next day after Ruloff; went to Ithaca three or four days after my marriage; Dr. Bull lived three and a half miles from my father's; he was very intimate and often there; was a single man; sometimes he was there every week, and sometimes not for a month; I have to guess at the time of the kissing; I have no knowledge myself how often Bull had been there before; the time I saw the kissing was in January, 1844; that winter visited home often; Ithaca is seven or eight miles from my father's; Dr. Bull kissed my wife and Ruloff's wife; didn't kiss my mother or sister Jane; it was towards evening that Dr. Bull came in; Ruloff left that night; didn't then hear him say what for; he came back the next morning; can't say that Bull was there when he returned; I left Ruloff there; no difficulty after he returned that day; saw R. and his wife together; can't say what time of day I left; it was in the afternoon; my wife went with me; can't say when I saw defendant next; he was often down to Ithaca that winter; think at this time he was living in Ithaca; at the time I have been speaking of, he was clerking it a month or two months; while he was a clerk his wife lived with him in Ithaca; in a few days after his marriage moved with his wife to Ithaca; he boarded at Mrs. O'Brien's; I boarded there too; knew of no difficulty at that time; they appeared to be happy; at the time of the kissing Mr. and Mrs. Ruloff were up home on a visit; don't know how I and my wife went up; think it was in a

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sleigh; my wife returned with me; can't say that Mr. or Mrs. R. returned with me; the interview of which I have spoken was some six months after the marriage; at that interview we were coming down to Ithaca on horseback; defendant was then living at my father's; during the six months he was part of the time in a store at Ithaca and part up to Dryden; when he left Ithaca he took his wife to her father's: this was in the fore part of March or February; I continued at Ithaca; he taught school the next fall after his marriage; he worked on the canal before he came to father's; what I mean is that he came up on a boat on the canal with my brother; afterwards went back on to the boat; came to my father's in spring of 1842; can't say how long he worked for my brother; he returned again on the boat, and then went to work on my father's farm; I first went to Ithaca in 1835; since then have lived there most of the time; he taught school in the fall or winter of 1842; it was a select school; taught school summer of 1843, six or eight miles from my father's; my sister attended that school the first winter for four or six months; think that winter I first heard that Ruloff was attentive to my sister; think his attentions continued throughout the summer; it was December following she was married; then between eighteen and twenty years of age; we were on our road to Ithaca when Ruloff said he didn't believe there was any improper intercourse; it was in summer, about six months after their marriage; just before he had left my sister to stay away from her; don't positively recollect that Ruloff said so; he remained in Ithaca two or three days; boarded at Mrs. O'Brien's; she lived in Ithaca; then he went back to father's; I saw him next morning at my father's; then he and I came back together to Ithaca; that was the time when he said he didn't believe there had been any improper intercourse between his wife and Dr. Bull; before this interview he said he thought there had been illicit intercourse between his wife and Dr. Bull; can't tell where nor when

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this interview was; he expressed himself that there was an intimacy; Rulloff began to keep house, in the fall of 1844, in Lansing, and so continued to next June, near Mr. Robertson's; I was there at the house once; they were living pleasantly; saw them often down to Ithaca together; think once they stayed all night; I thought he was a good provider for his family.

Re-direct. Once Rulloff and his wife came to my house with his child, at Ithaca; Rulloff sat at the window looking out, and took up the child and told Harriet to go with him, he didn't want her to meet Dr. Bull; he sat the child down; I then said I was tired of hearing about these troubles, and if he couldn't omit the subject I didn't want him to come; my child died June 3d, 1845, and my wife the fifth.

Re-cross-examined. Bull came to my house the day Rulloff was there; he didn't see Rulloff and his wife at all; defendant was in the parlor when he took up the child.

Jane Schutt sworn. Am a sister of the late Mrs. Rulloff; lived at home at the time of her marriage; not long after the marriage they had a difficulty; Dr. Bull came to the house on an errand, and Rulloff left; I didn't see any trouble except that Rulloff left; Bull came for a wheelbarrow; Rulloff stayed away till the next day; didn't hear Rulloff then say anything to his wife, but have heard him say he wished her never to see and speak with Bull; they had frequent difficulties about Dr. Bull; can't mention times; don't know of any other cause of difficulty; once in January or February after the marriage my sister was pounding pepper, and didn't pound it fine enough to suit him; he proposed to do it for her; she poured it back again, and he tried to get the pestle, and she said she would pound it; he snatched the pestle and hit her on the fore head; she carried the mark for some days; Rulloff left her once or twice while she was at my father's; shortly after their marriage they went to Ithaca; after that returned and were again at my father's; then went to Lansing; part of

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the time for two or three months they roomed at a widow's near father's; when they first went to Lansing, lived in Mr. Bright's house; in April, 1845, moved to the one near Robertson's; went to the widow's in the summer.

Cross-examined. I went to Ruloff's school; I am older than Mrs. Ruloff; my sister was twenty when married; didn't see Ruloff leave the house when Bull came for the wheel-barrow; did not see him immediately on his return; don't think the pepper was a playful matter; didn't hear any angry words at the time; can't say what he said except that the pepper wasn't pounded fine enough; he drew the pestle from her and struck her; it was a marble pestle; I think it was a hard blow; it knocked her back several steps; he made some apologies; he said he didn't intend to strike her so hard; he appeared shocked and surprised that he had hit her so hard; she insisted that he did it on purpose; I was at their house at the widow's, and in Lansing: he provided tolerably; made her some presents; lived happily at times; at times not; once, at my father's house, he began to pack up things to leave her; took up her wedding dress, and said he wouldn't leave it, for in three weeks she would have it on and be with Dr. Bull; he went away; took nothing with him; very soon my father turned him away out of doors; don't think Ruloff was ever in my father's house again; in a few days his wife went with him; he met her; went to the widow's; stayed two or three months; they set their own table; from there they went to Lansing; I was there; they kept house there; was there the last of April or first of May; it was two weeks or less after her child was born; it was born April twelfth or thirteenth; stayed there about two weeks.

Hannah Schutt sworn. Am mother of Mrs. Ruloff; she was married on Sunday, and they went the same day to William's wedding; remained a month or so at Ithaca, then came back; I saw that she was unhappy; heard no conversation between them that I can relate; William's wife died

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on the fifth and his child on the third; on the fourth of June, when Rulloff was about leaving, he said that if William's wife and child died he might thank himself for it, and we were little aware of the judgments that were coming on our family; Rulloff and his wife came to our house in May, 1845; stayed about three weeks; went back to Lansing, June sixteenth. A few days after they came home William came; said his wife was sick and wanted him to visit her; the next day Rulloff wanted me to go and take care of her; said he supposed I felt anxious for her to get well; then Rulloff said William had misused him, and it was wholly indifferent to him whether she got well; that William had misused him about Dr. Bull, and that thing would yet mount up to the shedding of blood; on the way to William's he said it was strange that I had raised so many children without losing any, but my gray hairs would yet go down in sorrow to the grave; he said William's wife and child have gone; who will go next? he said then Harriet and her babe would go next; this was the 5th of June, 1845; said William had misused him a short time before he was called to prescribe for the wife.

Cross-examined. William's child was three months old or more when it died; Dr. Bonney had attended her for Rulloff; the child was taken with convulsions; Rulloff was called to William's wife, who was sick first; she went into a decline and had a cough; she was sick about two weeks; she had been usually smart but took cold; she never recovered her health after her child was born; was imprudent in going out too soon; I went to William's Saturday; his wife died Thursday; I was at home when Rulloff was tried before; was not then sworn; didn't go to court at all; don't know why; I knew of the trial; I informed the family of this conversation shortly after it occurred; can't say that I have told anybody but my family; I have told it to Dr. Bull's mother; can't say when; I told my family of it before the other trial:

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Harriet Ackerman sworn: Knew Mr. and Mrs. Ruloff; boarded at Mrs. O'Brien's while they were there; it was the summer after their marriage; they had some difficulty about William's going to Jefferson and not getting home in time; he wanted Mary Schutt to go home nine or ten miles a-foot; she was eleven years old; Mrs. Ruloff said she shouldn't; after dinner they went up stairs; I heard a noise, went up; Mrs. Ruloff stood by the foot of the bed with a pillow before her mouth, and he had a vial in his hand; he said the d——d bitch was agoing to poison herself; he was not near her; she said, Oh, Edward, aint you ashamed of yourself? Mrs. Ruloff asked me why I didn't go to my shop; I went down stairs and started to go; went back into the room; then went out again and met Mrs. O'Brien and others going up; they had some words; he wasn't trying to do anything; I heard something like a blow; at this time Mrs. Ruloff put her hand on his head and said, you're mine forever, dear Edward, whether you live with me or not; he threw the vial out of the window; that night he took them home.

Cross-examined. She said she did not want me to hear the difficulty; was not sworn on the other trial; had mentioned this before; I saw the vial thrown out of the window, and the hand placed on the head; saw nothing else; I boarded with Mrs. O'Brien six months; Ruloff got a horse and carriage and took them away; they never came back there again; I am now twenty-nine years old; I was then tailoring; I lived at the time of the trial seven miles from Mrs. O'Brien's; I had gone home before the last trial; after that Mr. and Mrs. Ruloff lived together at Schutt's and in Lansing; Mrs. Ruloff wasn't hurt then that I know of; no personal violence was used that I saw; at times they seemed to live very happy; he did everything he could for her; was at Ithaca last August.

Jane O'Brien sworn. I kept the boarding-house spoken of; Mr. and Mrs. Ruloff were with me off and on; when

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they first got back from Jefferson it seems that the minister kissed both the brides ; he, Ruloff, said if he was a woman he would murder a minister before he would permit him to kiss her ; said he didn't believe in such habits ; afterwards they went to a shilling party, and the minister kissed his wife again ; this was about a week after ; he was very angry ; said he would never take her anywhere again ; she went without a meal for two days ; about three weeks after the marriage Dr. Bull called ; kissed Mrs. Schutt and Mrs. Ruloff and Mr. Schutt ; Ruloff got up and left the table ; he came down stairs and went away ; he didn't come back to dinner ; Bull had then gone ; Ruloff came back in a little while and went up stairs ; then came down ; then we, William's wife and I, went up and found her sobbing ; the last of April or first of May, William went to Jefferson and stayed longer than Ruloff wished ; the latter was very angry ; Ruloff was determined that the child should go home on foot and pushed it towards the stairs ; Mrs. Ruloff followed to the stairs ; I heard something like a blow ; as I went up I saw her, and she said, Oh, Jane, come up quick ! Mrs. Ruloff said, Edward is going to make me take poison and take it himself ; they were clinched together ; he had the bottle in his hand, and I and she tried to take it away ; I took hold of her ; he said, By the living God, this poison will kill both of us in five minutes, and that would put an end to their troubles ; he saw they were getting the better of him and he threw it out of the window ; then they got over the excitement, and he began to twit her about Bull, and she dropped on her knees and said, Oh, Edward, I am innocent as an unborn child ; he struck her in the face, and said, Get away, G—d d—n you ; you know better than to come near me when I am angry as I am now ; the blow knocked her over ; she looked very red in the face ; he then told her she could go and live with Dr. Bull, and seek all the pleasure she wished to, for he didn't want to live with her any more ; he charged her with sexual improprieties ; his language was pretty

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broad; that was about all that was said; I advised him to go away and leave her; Ruloff said that before he would leave her to another he would serve her as Clark did his wife; Clark murdered his wife; said Clark was a gentleman, and he would chop her as fine as mince meat; that night he carried them back; two or three days afterwards he said he was going after his wife's clothes; that no other man should have them; he didn't get them; he came in about twelve at night, and sat down with a letter from William Schutt in his hand, and said he sometimes felt like destroying the whole family, and then being hung like an honest man, as Clark was; Clark was hung some twenty-six years ago.

Cross-examined. Lived in Ithaca; am not a widow; my husband now lives there; I am a cousin of the Schutt children; I was sworn on the former trial; didn't tell all of this story before; the part I told before was the difficulty about the girl, the sister, at my house; that was about all; was examined about five minutes; they told me I need not tell all then; that was before the trial; I met Mrs. Ackerman as I went up stairs; she turned and followed me up; was up there by the time I got there; some of the time they lived very quietly; he was a clerk in Hale's store; after that first difficulty she never appeared as cheerful as usual; used to go home together frequently; these were all the difficulties I saw between them; the one occasion as to the sister was all I mentioned before.

Gerrit Van Pelt sworn: I knew Ruloff and his wife and Dr. Bull; think in June or July, 1844, had a conversation with Ruloff; he told me he saw Dr. Bull and his wife at the mill—this was before his marriage or after, as he said, and I can't now say which; he said he heard them talking together; that Bull said, Harriet, you have been seduced, and I think you might be again; that she turned it off with a laugh, and didn't appear to resent it at all; I told him I had always known Harriet and thought her discreet; at

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another time Ruloff said, Gerrit, don't you see her life is in my hands?

Cross-examined. The first conversation was in Dryden, near Mr. Schutt's; the mill was close to Schutt's house; "seduced" was not exactly the word he used; I can't recollect whether he said they were married at the time I spoke of or not.

Thomas Robertson sworn: Lived in Lansing in 1845, and live there now; knew defendant and family; live on the middle road five miles north from Ithaca; for a few weeks he and I lived near each other, a scant mile and a half from the lake; his house was on the corner opposite mine; I was on the west side of the road, defendant on the east side, but the width of the road north; part of the time they, as was said, were at Mrs. Ruloff's father's; his family consisted of a wife and female child; in June, '44 or '45, Ruloff called on me for a horse and wagon between 10 or 11 o'clock; he wanted a wagon to carry a chest of his uncle's to Mottville; think, but am not certain, that he named his uncle as Boyce; Mottville is eight or ten miles from my place; I let him have the horse and wagon, but reluctantly, because it was an extreme hot day; he came for the horse a few minutes after twelve; he took dinner with us; just after dinner my son and he got the horse and went to his, Ruloff's, door; I saw them there and went over, and just as I got there defendant was pushing a chest towards the door, and took hold of it to put it in the wagon; I said, Shall I help you load it? he said, If you please, sir; I did it, and he went in the house, leaving the door about one-third open; I moved the horse across the street into the shade; subsequently he drove off; the end of the chest was heavier than if filled with ordinary clothing; my end weighed about sixty or seventy pounds; a part of this building had been previously use for a store; the windows had tight shutters; they were sometimes shut and sometimes open; the south windows were closed, and one-half of one towards me was open; am not positive about

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this ; he went directly south on the road to Mottville ; that road did not communicate with the lake except by other cross roads that he could have taken ; there are woods upon these roads going to the lake ; after I hitched the horse R. came out with a flour sack or pillow case about one-third full and put it into the wagon ; have not seen the family since, he brought the horse and wagon back about twelve the next day ; the horse didn't seem to have been driven, wasn't sweaty ; was as hot a day as the one previous ; he took dinner with us that day ; at three or four P. M. I saw Mr. Ruloff going towards Mottville or Ithaca with a bundle in his hand ; bundle was tied up in a reddish shawl or handkerchief.

Cross-examined. Think when I came back I noticed the horse ; not near ; nothing that surprised me ; we shoved the chest over the side of the wagon ; I lifted with one hand ; the wagon was near the shop ; the chest was shoved into the wagon without anybody getting in ; the south shutters were sometimes closed to keep the sun out, when the family were at home ; the chest was about as heavy as if stowed with books ; he had a library ; box wouldn't have held all ; afterwards some, most of them, were gone.

Elizabeth Robertson. Am wife of last witness ; saw Mrs. Ruloff last, June twenty-four, day before he got the horse and wagon ; she took some soap home with her, and said she would wait till the next day before she washed ; this was about nine in the morning ; she was at my house that P. M., had her child with her ; have not seen her since ; the shutters, that day that he took away the chest, were closed ; continued so till he went away in the P. M. ; they were all shut till he started to go away, and then he opened one ; I saw they were shut in the morning, and spoke of it ; this was unusual ; he came to our house between ten and eleven, and asked for a horse and wagon to go after his wife ; said his uncle came there the last night and left a chest there to make room in his wagon for his, Ruloff's, wife, and took the

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wife to Henry Snyder's; he, Snyder, was not an uncle; lives in Dryden, three miles off; he wanted to take the chest to Mottville; I referred him to my husband; Ruloff then went to his house; had seen the chest he took away before; it belonged in the family; had been there ever since they kept house; defendant's child was a daughter about two months old; the morning when Mrs. Ruloff came for soap she had a calico dress on, dark, sleeves torn off above the elbow; noticed a ring on her finger that afternoon that I had never seen before; it was a valuable ring with a set in it; Ruloff took dinner with us both days; Mrs. Ruloff usually wore a large woolen shawl, white and black, small check, when she traveled; saw Ruloff the next day when he was going south; had this same shawl tied full and on his back; was going south; I asked where his wife was; he said she had gone between the lakes; I asked him when he was agoing to bring his wife back; he said in three or four weeks, maybe never; have seen that calico washing-dress since; went in the house with the family of Schutts three or four weeks afterwards; went with others; I saw that wash-dress lying at the foot of the bed on the floor; it lay on the floor in a heap; saw some shoes and stockings; know they were Mrs. Ruloff's, that she had worn the day before; they were before the bed on the floor; saw a skirt in another room hung up; part of the bed was on a chair; bed was not made; saw her traveling basket there, which she carried when she traveled; she had but one; saw a small pair of child's socks in the basket; saw the dirty clothes in the wash-room; the soap had been emptied out of the tin pail into a wooden pail; some of the table dishes were on the table.

Cross-examined. Had known them from October till March; they then lived in Bright's house, half a mile off; Mr. and Mrs. R. were always very kind to each other when I saw them; they had lived opposite our house two or three months; moved there in July; couldn't say how the shut-

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ters were when they came there; they never shut the windows when they went away; they "want" shut very often; didn't mention about the windows when sworn before; did speak of the shawl then; recollect that I did; there are two rooms; a bed-room in the house, also a clothes press; the kitchen was the largest room, and the bed was there; the wash-room was back of the house; Mrs Ruloff was then in good health; in the afternoon when she called she had not the washing-dress on; she was dressed up; she wore several dresses at different times; before she went home she said Edward was away, and she shouldn't wash till he came back to carry water; the first day he said his wife had gone to Snyder's; I have forgotten how I testified as to the second conversation on the former trial; can't say what day of the week it was that she borrowed soap; it was not Monday, it was Tuesday or Wednesday; the night of the day she came for soap I heard a double lumber wagon turn around to Mr. Ruloff's house, and heard it start away again in fifteen or twenty minutes; it was between eight or nine o'clock; it was between ten or eleven o'clock; it went south; can't say who was in it, or how many; remember to have heard Ruloff's door shut after the wagon left; closed my door at the same time; can't recollect that the wagon went east; haven't conversed with any one about the way the wagon went; have heard that Dr. Burdick drove that way within a year; it was a dark night; don't know whether it was moonlight; the wagon stood hitched on the east road, between Ruloff's and Fields'; heard it turn around; can't say which way, south or east; it drove off; Mrs. Ruloff that afternoon stayed to tea; didn't see Ruloff when he returned with the wagon; we dined about twelve o'clock; can't say how soon after he went away; the ring wasn't taken off at our house; I spoke of it as she was wiping dishes; it was all of six weeks after Mrs. Ruloff's disappearance that we went there; the blinds were on the west and south; three or four windows had blinds; there were no

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east nor north windows ; noticed the blinds were closed in the morning of the day when he went off with the chest ; one blind was open when he came with the wagon ; this was the first time I had seen the blinds closed.

Re-direct. This wagon came close to Ruloff's ; Fields lived a short distance off.

Re-examined. This shawl was a winter shawl ; don't know that she had another ; in traveling in the night, in June, she would usually have worn it.

Dr. John F. Burdick sworn. Reside in Lansing ; I am a physician ; practice there ; I visited a patient at Mr. Fields' about the time of the disappearance of Mrs. Ruloff ; I visited her in the night with a horse and sulky or buggy ; Fields' is about three rods from Ruloff's ; I came between eight or nine o'clock, and hitched my horse opposite the east end of Ruloff's house, and went to Fields' house and stayed till about eleven o'clock ; I went and unhitched my horse and drove up east towards Mrs. Fields' to talk with her, and then turned around and west to the middle roads, and then drove south home ; I heard Robertson's and Ruloff's doors close as I was turning my horse to go home.

Cross-examined. I was at Fields' two or three hours ; it was on the twenty-third of June that I was there ; think it was on Monday, the night there were some squaws in the neighborhood ; I conversed with Mrs. Fields before I turned around, and when I turned around I went directly home.

Olive Robertson sworn. I am a daughter of Thomas Robertson ; I remember the time the squaws were there ; I was at home that night ; Ruloff was at our house ; he told me to go to his house, that his wife might be afraid if she knew that Indians were there ; I stayed till nine o'clock and went home ; Mrs. Ruloff was holding her child in her lap when I went away ; nobody else was there when I was first there till defendant came with the Indians with him ; Indians stayed a short time ; while they were there defendant showed Mrs. Ruloff and myself the jewelry and moccasins the Indians

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had with them; defendant then gave the Indians something I thought was money; after the Indians left, I think I saw him stirring something in a tea-cup; think he said it was composition tea; he was stirring it with a spoon in a tea-cup; never saw Mrs. Ruloff or child since.

Cross-examined. Defendant told me to go to his house, that Mrs. Ruloff would be afraid alone, if she knew Indians were in the neighborhood; there were two of them; no children; wore blankets and head-dresses.

John W. Gibbs sworn: I live in Lansing; I knew defendant in 1845; about the time his wife disappeared, defendant stopped as he was going north with Robertson's horse and wagon and a chest in it; it was about twelve o'clock; he drove at a moderate gait as usual; I live about eighty rods south of Robertson's; I saw Ruloff again between two and three P. M.; he was on foot, some ten or fifteen rods from me; he said, "Good bye, pap;" that he and his wife were going to visit between the lakes five or six weeks, and would visit me when he came back; he had a bundle, and was going west, towards Ithaca.

Cross-examined. Defendant always treated his wife friendly so far as we knew; we visited back and forth.

Elijah Labar sworn. I reside in Ithaca, one and a half to two miles south of Robertson's; knew defendant in 1845; remember the time of his wife's disappearance; saw him pass my house, with Robertson's horse and wagon, about two o'clock, P. M.; was a chest in the wagon; he was alone; he was going south; the road led to Mottville and Varna.

Newton Robertson sworn: I am son of Thomas Robertson; defendant had father's horse and wagon; I steadied one end of the chest in the wagon when it was loaded; defendant and father had hold of chest; Ruloff returned next day with a chest; I didn't help lift chest out or lift it after it was out; I think it was the same chest that went away; he got

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back some time in the forenoon ; I believe Ruloff took it out himself without difficulty ; it did not seem heavy.

Cross-examined. I looked at the chest and thought it was the same one ; I did not examine it to see if it was the same or another chest ; I saw Ruloff take it out of wagon in front of his house, before the horse was taken from wagon.

Henry Snyder sworn. I live in Dryden, three or four miles from Robertson's ; I am not related to the Schutts ; my son is ; no other Snyder is related to them ; the family usually call me uncle Henry ; I did not carry, in 1845, Mrs. Ruloff to my house ; she was not at my house in June or July, 1845 ; don't know about her going to Mottville or between the lakes ; I never left a chest at Ruloff's or anywhere else.

Cross-examined. I did not see Mr. or Mrs. Ruloff alone that time ; there is no other Henry Snyder in the neighborhood ; I have five or six brothers ; six sons.

Emory Boyce sworn. I live in Caroline ; Mottville is about one mile west of my house ; my wife and Mrs. Ruloff are cousins ; visited together before her marriage ; Mrs. Ruloff was not at my house in June or July, 1845 ; nor was defendant ; defendant and wife were at my house in 1844 ; no chest was left at my house, in 1845, by Mr. Ruloff or any other one ; know nothing about any chest.

Jane Schutt recalled. About the time of my sister's disappearance, defendant was at Ithaca, the day after the Indians were there, twenty-fourth of June ; it was before noon ; don't know how he came ; he said he and Harriet were going away out between the lakes ; that a family visiting in Lansing had advised him to go ; that he thought he should go and stay five or six weeks, and might return ; he said he was hungry ; would not wait for me to get him something to eat, but went down to the cellar and eat ravenously, taking his food into his hands ; I understood his wife was at home then ; I gave him some of William's babe clothing ; he first objected to taking it, but finally did so ; he stayed half an hour ; said he was going back home ; saw him again

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the same day, in the afternoon, near five o'clock; I said I thought you were gone to between the lakes; he said the family with whom he was going would not go till next day, and he came to have us tell uncle William Schutt, at Mottville, that he could not go and deliver a lecture up there; he stayed two hours; said he was going with that family on the morrow; Mrs. Ruloff had a ring with a set in it; she had had it several years; after tea he said don't my face look red; I said it did; he said he had walked five miles very fast, and it made his face red; he then read the *Mysteries of Paris*, and commenced weeping; said he never could read that part of the book without crying; after that he took out the ring from his pocket and asked William if he remembered it; William said he did; he gave it to his sister years ago; defendant said, Don't you want it? William said, No, give it back to your wife; defendant said his wife gave it to him while at her father's, a number of weeks before, and he had carried it since. A box is shown witness, which she says defendant made at her father's house, and witness recognized a bead work-box, wrought collar, belt, wristlets, as articles that belonged to Mrs. Ruloff; recognizes pieces of silk as the same as her wedding-dress; also the hose, she thinks, but not the elastics; cotton hose, worked with silk; also a card engraved "Edward H. Ruloff." I went to the house after the disappearance; saw some articles I recognized; a delaine dress, calico wash-dress, quilted skirt, shoes and stockings; can't say where the skirt was; think there were elastics with shoes and stockings. .

Cross-examined. I was examined eleven years ago; I was then examined mostly about the striking; think I did not testify about the conversation at William's on twenty-fourth June; I had not kept those facts secret; have told them to William; he was sworn on the other trial; I think I did not swear about the ring; think brother William did; I recollect most distinctly the piece of wedding gown, the wrought collar and wristlets.

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William H. Schutt sworn. I remember Rulloff at my house the day after the disappearance ; I saw him at tea ; he spoke of his face burning ; asked if it didn't look red ; said he had walked some ways ; after tea he took the ring out of the vest pocket ; he asked if I recognized the ring ; I said it was one that I gave his wife several years ago ; he said, Don't you want to take it back ? I said, No, give it back to your wife ; he put the ring back ; said he had carried it since his last visit to my father's ; my sister usually wore that ring ; he said he was going between the lakes next morning ; should take his wife along ; that he had some prospects of getting in business ; he stayed till after tea and went down to the store with me, and after a little he went out ; returned shortly after and got a rocking chair that belonged to him ; saw him again about nine o'clock that night, at Dr. Stone's office, bringing a chest out or pulling it towards the door ; he had studied at Dr. Stone's ; I don't know what he was going to do with it ; I next saw him about six weeks after ; I have never seen his wife since ; six weeks after, he came into Hale's store, in Ithaca ; he said he had come from between the lakes, near Geneva ; I asked if his wife was there ; he said she was ; no place named ; I asked him up to my lodging room, and asked him if he had heard of a report there was about his murdering his wife and child ; he said he had not ; he seemed to be somewhat surprised that they should think any such thing ; he asked if it would be prudent for him to go out in the street ; while he was eating he said his wife was in Pennsylvania, near Erie, in about two hours' ride of my brother's there ; that he had not been to my brother's ; hadn't had time ; I said I thought it strange that he got her off so far, as she said she would not go far from home ; he said he got her on the railroad, and she, not being used to traveling, was going much faster than she supposed she was ; didn't say with whom she lived ; he stayed in the room with me that night ; his eyes were sore ; I wrapped them up in cloths ; he appeared restless

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during the night ; I asked him what troubled him ; he said it troubled him to think the people had that opinion of him, that he would murder his wife and child ; I told him to be easy and I would explain it ; the next day, in the afternoon, he left the store to go to my father's ; in the course of a week he came back to the store ; he remained from before noon till evening, when he left ; Henry and Jane came down with him ; Ruloff said he would not give any information about his wife ; we wanted him to stay till we could get a letter from her ; he said she was in Ohio, in Madison ; didn't say whom she was with ; after some conversation, he said he would remain and write to her ; he went to my house and wrote the letter ; after the letter was finished, Ephraim came down to the store with him ; he had written a letter to his wife, and a letter to Depuy, directing him to get the letter to his wife ; it was directed to Madison, Lake county, Ohio ; he agreed to remain for an answer ; he left that evening ; chest at Dr. Stone's was a dark colored chest ; defendant was gone several days, when he came back, with my brother Ephraim, under arrest ; after he was in jail I saw him ; he said his wife was living and well provided for ; didn't say where she was.

Cross-examined. Defendant took tea with me and took the chest from Dr. Stone's on the same day ; that was the only day I saw him that week ; I supposed generally defendant and wife lived happily ; he provided well for his family and often carried presents to her, at one time oranges ; I and my wife boarded with them at Mrs. O'Brien's ; afterwards separated, but visited together ; I have not seen or heard anything from my sister or her child since June 18, 1845 ; don't know whether they are living or dead.

Jane Schutt recalled. When Ruloff came back at the end of the six weeks, he said his wife was at Madison, Lake county, Ohio ; I saw him write the letter to her ; I saw my brother take the letter ; there were four gentlemen chosen who labored hard one afternoon to get Ruloff to tell where

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his wife and child were; the tenor of his letter was to have her write that she was alive; he read the letter to us in the evening; Ephraim took it; then Ruloff asked me to go after a drink of water; as I went down, I saw a bundle on the bureau; when I came up I missed it; I kept my eye on him; he walked back and forth for a while as if he wanted to get rid of me, then went on to the front stoop, and then went off suddenly; the bundle was missing; I sent word to the store that he had left.

Milton Ostrander sworn. I live in Ithaca; was employed in Babcock's livery stable in 1845; Ruloff got a horse and wagon of us on the evening of June twenty-fifth; got a lumber box wagon; got it about dark; said he wanted to go three or four miles; he had Dilworth's wagon.

Eber Babcock sworn. I am one of the owners of this livery stable; Ruloff returned the horse and wagon about three A. M.; the date on the book was June twenty-sixth; the wagon belonged to one Dilworth.

Edmund H. Watkins sworn. In 1845 I lived at Ithaca; was a stage agent; I knew Ruloff by sight; a man took the stage for Geneva; entered his name as John Doe; this was defendant; he had two chests, or a chest and a trunk chest; wasn't much difference in their size; the chest was brown; the other, I should think, was put together for the occasion; first saw them in the stage office in the Clinton House.

Cross-examined. This was in the morning, about seven o'clock, of the twenty-sixth of June; I was a little surprised at the name; by information I knew him; I did not know him personally; didn't see him again until the trial in 1846.

Harrison Robertson sworn. I lived in Trumansburgh in June, 1845; went out on the stage only once that year; Ruloff went out with two chests as baggage; he gave his name to the proprietor as John Doe; he went on through Trumansburgh.

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Cross-examined. The chests were two painted chests, about the same size ; Ruloff said they contained books.

John F. Burdick, recalled. Two or three weeks after Ruloff left I went into the house after some books he had borrowed of me ; Fields and I went in ; I didn't find my books ; I got my books afterwards ; saw some dirty clothes in the wash-room ; saw a skirt at the foot of the bed laying in a circle ; also stockings, shoes, elastics ; some dishes on the table, unwashed ; noticed a stove ; a line with some diapers ; on the stove a tin wash-dish ; one or two diapers lay near the door ; saw the wash-tub ; three or four weeks after I went in with forty or fifty men, and found the things about the same as at first ; think the Schutts were there ; sheriff Porter took the lead ; the bed was in disorder ; in the bed-room was a bureau, and on top a miniature bureau ; Porter found an invoice of his effects ; saw the traveling basket.

Cross-examined. We got the key of Mr. Fields ; nothing was disturbed the first time I went to the house.

Richard K. Swift sworn, says : I reside in Chicago ; lived there in 1845 ; dealt in money ; principally in real estate ; think in 1845 my brother was applied to for a loan by a man ; my brother refused ; heard the man say he had lost his wife and child, and was out of money ; I said to brother if he didn't let him have the money I would ; I let him have \$25 or \$30, for which he gave me his note, signed, I believe, James H. Revillee ; he left as security for the payment of his note, a brown chest, snuff brown ; I think about eighteen or twenty inches across ends, three feet or more long ; as near as I can now remember, he said his wife and child died south of Chicago, on the Illinois river, in Illinois ; I think he said they died about six weeks before ; I was at Ithaca in August last ; saw defendant ; I thought I recognized him ; I might not have recognized him in a crowd ; he told me if he didn't return in a certain time I was to write to a certain place near, I think, the Mohawk river,

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and he would remit the money; I wrote and received no answer; I then, with Dr. Dyn and others, opened the chest; found a good many books; the box now in court, a sheet, and some other things; he was there with me and got the money August 4, 1845; that was the date of the note; I have a statement, made out February 18, 1847, of contents of the box; I remember a large bundle of papers, lectures on phrenology, Hooper's Dictionary, E. H. Ruloff written on inside cover; some of the names were erased; names of places rubbed out; so of names of persons; small box contained women's fixings; papers in bottom of box; letters; cards marked Edward H. Ruloff; a paper on which were the words, "Oh, that dreadful hour!" one lock of light brown hair in paper, labeled a lock of Harriet's or Mary's hair; I thought Harriet; think the chest was heavy with books; saw a pocket-book in box; can't identify it; style of card is the same; pair of hose like these; remember a piece of silk and a bead bag like this; remember a collar like this; the small box was in our house for many years; the lock of hair was lost, and so of the loose pieces of paper on which the words were written; I remember a figured lace cap for an infant; the silk was light colored, ash colored; there were a lot of small sea-shells.

Cross-examined. Defendant looks like the man I loaned the money to; I next saw him in Ithaca last August; I think he said his wife and child died on Illinois river; think he said he had a farm down there; think he said it was six weeks since they died; I think I expected him back in November; note was due October 4, 1845.

Mrs. Richard K. Swift, sworn, says: I am wife of last witness; remember his bringing this box home; identified the articles remaining in box as the same; the infant's cap was used up; remember the hair but not that it came in the box.

Aaron Schutt, sworn, says: I live in Dryden; am brother of Mrs. Ruloff; before Ruloff went away in August and

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Ephraim followed, defendant wished me to go with him and carry him and his goods to Montezuma in a two horse wagon ; I said I could not go ; he said he would help me in harvest if I would go, and did so ; I think I did not agree to go ; I advised him to take them to Ithaca with a one horse wagon ; he wanted to save expense by my carrying them to Montezuma ; Ithaca was five miles from his house ; Montezuma was forty or fifty miles from our house.

Ephraim Schutt, recalled, says: There is no landing on the lake nearer defendant than Ithaca ; I visited defendant's house when suspicions were raised ; I know defendant had a cast iron mortar that would weigh twenty-five or thirty pounds ; he had flat irons ; on search could not find anything of them ; I agree with Dr. Burdick as to appearances at the house ; I was at Hale's store in Ithaca five or six weeks after Mrs. Ruloff's disappearance, and saw Ruloff enter the store ; William shook hands with him, and asked him where he had been ; he said, between the lakes ; William asked where his wife and child were ; he said, between the lakes ; William and he went up stairs, and I saw no more of him that day ; next saw him, when he came back from my father's, at William's ; I was there when several gentlemen came in to ask him about her ; he would give no definite satisfaction ; they left him and told him that he would probably be detained ; after they were gone he asked what he had best to do ; I told him to write to her immediately, and asked him if he would remain until they got an answer from my sister ; he said he would ; that she was at Madison, Lake county, Ohio ; he then commenced writing his letter ; wrote one and tore it up ; after that wrote another ; after dark he directed the letter to N. Depuy, Madison, and gave it to me to show the gentlemen, and mail ; I did so ; shortly after I mailed the letter I was informed defendant had left ; I pursued him ; I went across to Geneva ; got there early in the morning ; searched first train but could not find him ; at Rochester we changed cars ; there I saw him and he me ;

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I remained in car till the train was in motion ; then went through the car ; found him on last emigrant car, on back platform, with bundle in his hand ; he said he would go with me where my sister was ; we went on together to Buffalo ; I said we would stop at the Mansion House ; he objected ; expressed some fear that the officers would be after him ; we finally went there ; I called for a room and both occupied it ; I said I would enter my name on Hotel book ; he said he would sleep on floor, as there was but one bed ; he took off his shoes ; his feet were blistered badly ; said he blistered them walking from Ithaca to Auburn ; he got to sleep ; I locked him in and went away ; came back ; he was frightened as I came in ; said he thought it was officers from Ithaca after him ; next morning we went down to the boat ; got tickets for Fairport ; he paid for them and while I was looking about for a place to sit down, and while crowding through the crowd, he disappeared ; the boat started, and I failed to find him on board ; I then stopped at Erie, where I had a brother living ; I inquired of him, but could hear nothing from Ruloff or his wife ; in the morning I took another boat and went to Fairport ; with a private conveyance I went to Madison, and inquired for N. Depuy and Mrs. Ruloff ; could hear of no such persons ; no Mr. Depuy had ever lived there ; it was a small place, quite small ; I left their names with persons and asked them to write if any such persons were heard from ; I went from there to Cleveland ; obtained a warrant ; went down to landing ; saw two large steamers coming ; Ruloff was on the second boat with the emigrants ; I then went after an officer ; when I came back I found him in an eating-house, behind a dry goods' box ; I pointed him out to the officer, who approached him and said, Is your name Ruloff ? he said, No sir ; I said, It is he ; then he was arrested, and I then brought him back and he has since been in confinement ; he since told me his wife and child were living, but he would not tell me where they were.

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Cross-examined. Heard the officer pronounce the name of Ruloff; the sheriff told him that he would keep him in irons unless he would consent to go; I got a warrant in Buffalo from a magistrate, without examination, and brought him in irons from Buffalo; I recollect hearing the officer call the name; never have seen anything of the wife or child or heard anything.

The foregoing is all the evidence given on said trial.

Whereupon the counsel for the defendant renewed his motion, made at and upon the opening of the cause to the jury, and insisted that as it now appeared that no direct evidence of the death or the murder of the infant daughter had been given, no conviction for murder could be properly had or allowed, and that the jury should be so advised and instructed, and should be directed to find a verdict of not guilty. But the court declined, and refused so to advise, instruct and direct the jury; to which refusal the counsel for the defendant excepted.

The cause was then summed up to the jury by the counsel for the respective parties, and the presiding justice charged the jury as follows:

Gentlemen: The prisoner at the bar, Edward H. Ruloff, was indicted in the Tompkins County Oyer and Terminer for the murder of his infant daughter, about three months old. The indictment was carried into the Supreme Court by *certiorari*, and the cause came down to the Tompkins Circuit in August last for trial. The court, being unable to obtain a jury in that county, ordered the trial to be had in this county, and hence in the discharge of my duty, as judge presiding in this circuit, the duty of presiding on this trial has unexpectedly fallen upon me; and the same act which has devolved this highly responsible duty upon me, has also cast upon you the great responsibility of determining this traverse between the government and the prisoner at the bar. The charge against the prisoner is no less than the murder of his own infant daughter of two or three months

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of age. Murder, under our statute, is defined to be the unlawful killing of a human being. First. When such killing is perpetrated from a premeditated design to effect the death of the person killed, or of any human being. Second. When perpetrated by an act imminently dangerous to others, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual. Thirdly. When perpetrated without any design to effect death by a person engaged in the commission of a felony.

You should not forget, gentlemen of the jury, that we commence this trial with the presumptions all in favor of the prisoner. The law, in its clemency, presumes the entire innocence of the prisoner, and the government, before they have a right to ask the conviction of the prisoner, are bound not only to prove the alleged murder, but are required also to adduce evidence to establish the guilt of the prisoner beyond any reasonable doubt. In order to maintain their case, the government are called upon to prove, first, that a murder has been committed; and secondly, that the prisoner at the bar is the person who committed such murder. The first branch of the case, the *corpus delicti*, as it is termed in the law, by which is meant the body of the crime, the fact that a murder has been committed must be clearly and conclusively proved by the government. The *corpus delicti* is made up of two things: first, of certain facts forming the basis of the *corpus delicti*, by which is meant the fact that a human being has been killed; and secondly, the existence of criminal and human agency as the cause of the death. Upon this first branch of the case the counsel for the prisoner claims and insists that it can only be proved by direct and positive evidence; that the government must prove the fact of death by witnesses who saw the killing, or at least the dead body must be found. It has been said by some judges that a conviction for murder ought never to be permitted unless the killing was positively sworn to or

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the dead body was found and identified. This, as a general proposition, is undoubtedly correct, but like other general rules has its exceptions. It may sometimes happen that the dead body cannot be produced, although the proof of death is clear and satisfactory. A strong case in illustration is that of a murder at sea, where the body is thrown overboard in a dark and stormy night, at a great distance from land or any vessel. Although the body cannot be found, nobody can doubt that the author of such crime is guilty of murder. In such a case, the law permits the jury to infer that death has ensued from the facts proved. The circumstances being such as to exclude the least, if not almost every, probability that such person could have escaped with life, and yet there is a bare possibility in such a case that the person may have escaped with life. I am of opinion that the rule, as understood in this country, does not require the fact of death to be proved by positive and direct evidence, in cases where the discovery of the body after the crime is impossible. In such cases the fact may be established by circumstances, where the evidence is so strong and intense as to produce the full certainty of death. By the proof of a fact by presumptive evidence, we are to understand the proof of facts and circumstances from which the existence of such fact may be justly inferred. The facts and circumstances to establish the death in the case of murder, in the absence of any positive evidence, must be so strong and intense as to produce the full certainty of death, or, as Mr. Wills, in his *Treatise on Circumstantial Evidence* (p. 162; *Burr. Cir. Ev.*, 680), says, the death may be inferred from such strong and unequivocal circumstances as render it morally certain and leave no ground for reasonable doubt. The government claim that they have proved the body of the crime in the case under consideration up to the strictest requirements of this rule. This is for you to determine, gentlemen of the jury. The determination of it involves the examination of all the facts and circumstances disclosed by the evidence in the case.

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I am very much relieved from calling your attention to these facts and circumstances by the very full and able argument of the counsel for the prisoner and the people, who have rendered you very great aid in your duties, and have relieved the court in the performance of its duty by their comments upon the evidence of the case. This question is to be determined by you, gentlemen of the jury, in view of all the evidence reflecting in the least degree upon this branch of the case.

The government places great reliance, to establish the death in this case, upon the sudden disappearance of this woman and child under the circumstances of this case, without any apparent cause, and the failure to find either the mother or child after the most diligent search for eleven long years. The fact is very proper to be taken into account in determining this question, and is a fact of no little importance in determining the question; but, although this unaccountable disappearance and failure to ascertain any trace of them may lead to a strong suspicion that those parties have come to an untimely end, yet they are not alone sufficient proof of the death of this child and mother to justify a conviction, because the fact may be accounted for on the hypothesis (however improbable) that they may have absconded and eluded all inquiry, or may be kidnapped and concealed and be still alive, and upon this branch of this case it is your duty to take into consideration the fact, which seems to be admitted on this trial, that the prisoner at the bar was convicted in the year 1846 of having abducted his wife alive.

The government rely on the confessions of the prisoner made to and proved by Mr. Swift, to prove the death of this child; Swift proves the prisoner in Chicago, on the 4th of August, 1845, and he says that he told him he had lost his wife and child about six weeks before. He stated that they died south of Chicago, in Illinois, about six weeks before. It is for you to say, gentlemen of the jury, what construction should be put upon this language. You are required

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by the law to take this confession all together, as well that which makes for the prisoner as that which makes against him. The law, however, does not compel you to adopt the whole confession, if you find that the other evidence in the case proves any part of the confession to be untrue. I should say to you, however, that confessions are a doubtful species of evidence, and are to be received with great caution by both courts and jurors; and the law requires me to say to you that no man can be convicted of a criminal offence upon his own confession alone that a crime has been committed. Confessions are competent evidence in the case, but alone are not sufficient.

You have listened to the detail of the evidence adduced by government from the evening of the 23d of June, 1845, when the prisoner at the bar is proved to have been in his own house with his wife and infant child, up to the time when he is arrested in the city of Cleveland and brought back by Ephraim Schutt, and lodged in the Tompkins county jail, and all of these facts and circumstances have just been so ably and elaborately commented upon by both the counsel for the prisoner and the people, and the legitimate deductions to be drawn therefrom have been so fully presented to your consideration, that I am relieved from the duty of going over the evidence. It is proper, however, that I should state to you the rule which should govern you in the ultimate conclusion to be attained from the evidence in the case.

In regard to the first branch of the case, the establishment of the *corpus delicti*, the body of the crime, before you find it against the prisoner, you must be satisfied, from the evidence in the case, that it is established by presumptive evidence of the most cogent and irresistible kind; that it is established by circumstances proved so strong and intense as to produce the full certainty of death.

In regard to the second branch of the case, by which we mean the traverse between the government and the prisoner

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as to the question of the defendant's guilty agency in the commission of the alleged murder, as to this question of the defendant's guilt of the crime imputed, the rule which should govern is this : The government are required, before they can claim a conviction, to prove, by their evidence, the guilt of the prisoner beyond any rational doubt.

If, upon a full and fair consideration of all the evidence in the case, doubts remain in the minds of the jury, it is the duty of the jury to acquit. Upon this branch of the case the doubts, however, which require an acquittal should be rational doubts. They are not doubts which may arise in a speculative mind, after the reason and judgment are thoroughly convinced by the evidence in the cause.

To so much and said parts of said charge and instructions given to the jury as submit to them to infer, presume and find, without direct proof, the death and the murder of the infant daughter, the counsel for the defendant excepted.

The jury returned a verdict of guilty.

The defendant, having made a bill of exceptions, moved for a new trial, and the cause came on to argument before the Supreme Court at general term in the sixth judicial district.

Joshua A. Spencer, for the prisoner.

I. The counsel for the prosecution, in opening the cause to the jury, distinctly admitted that he did not expect or propose to prove, by any direct evidence, that the infant daughter of the prisoner was dead or had been murdered, or that her dead body had ever been found or seen by any one. Upon this admission the court should have stopped the prosecution. "In these cases of homicide, the precaution of Lord Hale seems to be enough for laying the foundation of circumstantial evidence: 'I would never convict any person of murder or manslaughter, unless the fact be

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proved to be done, or at least the body found dead.' (2 *Hale P. C.*, 290.) A departure from this important suggestion, which is now universally acted upon, was a capital error in *Miles' case* (cited *supra*, from *Phil. app.*) The body being afterward found, it plainly appeared that the death was accidental. In the two illustrative cases cited by Hale, one of the persons supposed to have been murdered was sent on a long sea voyage and the other had run away. The late remarkable case of *Stephen and Jesse Boorn*, in Vermont (*Boorn's case*, *Burr. Cir. Ev.*, 579, note C), was in truth of the latter character, though the prisoners actually confessed their imputed guilt." (1 *Cow. & Hill's Notes*, 394.) In the case of *The King v. Burdett* (4 *Barn. & Ald.*, 161; 6 *Com. L.*, 386), a case of libel, Chief Justice Abbott, in discussing the doctrine of presumptive evidence, says: "It was said, and truly said, on the argument, that guilt and crime are never to be presumed; and the cases of supposed murder mentioned by Lord Hale, and which have since operated as a caution to all judges, were quoted on this occasion. But the cases are wholly different. In those cases there was no actual proof of the death of the person supposed to have been slain, and consequently no proof that the crime of murder had been committed. The *corpus delicti* was not established." Nor was it in *Boorn's case*, though the guilt was confessed. Nor in the case at bar, for it is more barren of proof of death or murder than any case reported. No bloody weapon or blood stains or marks of violence shown.

II. At the close of the evidence, with an entire failure to prove any death or murder, or the production of the dead body, the learned judge should have instructed the jury, as requested, that they should acquit the prisoner; that the law did not permit a conviction for murder without proof of the *corpus delicti*; that the rule of Lord Hale is the true rule, by which courts and juries have since been governed. He erred, also, in charging the jury that without such proof they might lawfully convict the prisoner of the crime of

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murder. In 2 *Starkie's Evidence*, 944, this rule is recognized as the true rule. He says: "The proof of killing another involves the proof of the death of the person, and that it was occasioned by some act done by another;" and he cites Lord Hale's rule with approbation. In the case of *Webster* (5 *Cush.*, 295), if the body of Parkman had not been found and identified, and a felonious killing proved, no one would have thought of convicting Webster of his murder. It is called a case of circumstantial evidence, but the rule of Lord Hale is adhered to; the dead body was found and identified, and its condition proved its violent death. Who was the murderer was proved by circumstantial evidence, as it always may be. In the case of *Wilbor* for the murder of Barber, tried at the Madison Oyer and Terminer, the parties were co-travellers on a canal boat, left together at Canasara-ga to cross a piece of woods and join the boat at Chittenango. Wilbor joined the boat alone and said Barber had gone on to Syracuse, and claimed to take charge of his trunk. The next spring a human skeleton was found in the woods between Canasara-ga and Chittenango, the skull of which was broken, apparently by a stone lying near by; the clothes were identified as Barber's, by his daughters, and they had several holes through the vest and pants, as if cut by a dirk, and a wallet was found in a pocket of the clothes, which was also identified by the daughters. Wilbor was convicted and executed. Now, would any one have thought of convicting Wilbor of murder if the body of Barber had not been found and identified? The death (killing) is proved by direct evidence, and also the identity; but who was the murderer was alone proved by circumstantial evidence. The rule of evidence for which we contend is well stated by Burrill, in his *Treatise on Circumstantial Evidence*. (p. 678): "In cases of alleged homicide, the proof of a *corpus delicti* involves that of the following points or general facts: First. The fact of death, particularly as shown by the discovery of the dead body or its remains; Secondly. The

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identification of such body or remains as those of the person charged to have been killed; and, Thirdly. The criminal agency of another as the cause of the death. First. The fact of death. This is the basis of the *corpus delicti*; and the circumstance which furnishes the best proof of it, as well as the most effectual means of ascertaining its cause, is the finding and inspection of the dead body itself. Hence, it is a general rule of evidence that a dead body must have been discovered and seen, so that its existence and identity can be testified to by eye-witnesses. It is considered unwarrantable and dangerous to infer the fact of the death of a person from the circumstance of his sudden and unaccountable disappearance, even when followed by long continued absence, and even although such circumstances may be connected with others apparently casting suspicion upon a particular individual." It is true that the rule that the dead body must be found has its exceptions, as in cases of piracy, where the body is thrown overboard, or where the body is destroyed by other means; but in all these cases the other alternative of Lord Hale's rule is satisfied, "the fact, killing, is proved to be done," by direct evidence, as shown by all the cases cited to illustrate the rule. A death must be proved by direct evidence. When the death is shown, if by the dead body being found, the question arises, by what cause? Was the death natural? Was it accidental? Was it by suicide? Was it a felonious killing by another, and by what means? and by whom? All these questions may be answered by circumstantial evidence. But before any of them can arise a death must be proved. If by any other evidence than the dead body, it must and will show why the dead body is not found, by what means the killing was effected, and by whom; and these facts must be established by direct evidence; and they were so established in all the reported cases, where the dead body was not found. (2 Stark. Ev., 944.) In Wharton's *American Criminal Law* (283), is found this language: "There must be clear and unequivocal proof of the *corpus*

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delicti. The fact of the commission of the offence must necessarily be the foundation of every criminal suit; and until that fact is proved, most dangerous would it be to convict." He cites Lord Hale's rule, and then adds: "Equally emphatic was the language of another great judge (Lord Stowell): 'To take presumptions in order to swell an equivocal and ambiguous fact into a criminal fact, would, I take it, be an entire misapplication of the doctrine of presumptions.' The death, in such a case, should be distinctly proved, either by direct evidence of the fact, or inspection of the body. The proof must be clear and distinct." In *Roscoe's Criminal Evidence* (p. 13), the rule of Lord Hale is cited and approved, as also 4 *Blackstone's Commentaries* (p. 358) and 2 *Leach* (p. 571). In *Regina v. Hopkins* (8 Carr. & Payne, 591), the jury were directed by Lord Abinger to acquit the prisoner, because the body of her child was not found, nor the death otherwise proved by direct evidence. He says: "With respect to the child, which really was the child of the prisoner, she cannot, by law, be called upon either to account for it or to say where it is, unless there be evidence to show that her child is actually dead." In 2 *Leach* (p. 571), is found a very strong case. The mother and reputed father of a bastard child were observed to take it to the margin of the dock in Liverpool, and after stripping it to throw it into the dock. The body of the infant was not afterwards seen, but as the tide of the sea flowed and reflowed into and out of the dock, the learned judge who tried the father and mother for the murder of their child, observed that it was possible the tide might have carried out the living infant, and the prisoners were acquitted. (*Ros. Cr. Ev.*, 13.) In 1 *Parker's Criminal Reports* (p. 609, *Videtto's case*), Walworth, J., says: "One rule, however, which never ought to be departed from, is that no one should be convicted of murder upon circumstantial evidence, unless the body of the person supposed to have been murdered has been found, or there be other clear and irresistible proof that such person is actually

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dead. In 2 *Parker's Criminal Reports* (p. 14, *Porter's case of blasphemy*), the same judge held that the offence could not be established by evidence of the defendant's confessions made out of court; but that it must be proved that the crime had been committed by persons who heard it. Many other cases might be cited, but the foregoing are deemed sufficient. It is believed that modern writers have in no respect called in question the safe old rule of Lord Hale, but that, since its announcement, it has been universally approved by judges and publicists. It is therefore submitted, that his honor who tried this case fell into a fatal error, and that the verdict should be set aside and a new trial ordered.

Daniel S. Dickinson, for the people.

To establish the *corpus delicti* in this case, and the guilt of the prisoner, proof of two facts was necessary: First. The death of the prisoner's infant daughter; Second. That she died by his felonious act. His Honor, Justice Mason, held at the circuit that these facts, and each of them, might be established by circumstantial evidence, as follows: First. The first branch, "by presumptive evidence of the most cogent and irresistible kind, so that it is established by circumstances proved so strong as to produce the full certainty of death." Second. The second branch, "the government are required, before they can claim a conviction, to prove by their evidence the guilt of the prisoner beyond any rational doubt."

To these rulings the counsel for the prisoner excepted, and the only question to be discussed is whether they were correct or erroneous.

I. The whole course of authority, ancient and modern, elementary and adjudged, shows that a murder, like any other crime, may be proved by circumstantial evidence so strong and convincing in its character as to produce full certainty. (1 *Stark. Ev.*, 573-578; 3 *Greenl. Ev.*, § 30; 1 *id.*,

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§ 13; 3 *Cow. & Hill's Notes*, part 1st, 470-472, notes 286-288, new ed.; *id.*, 562-564, note 305; *Whart. Am. Cr. Law*, 284-286; 1 *Arch. Cr. Pr. and Pl.*, 135; *Barb. Cr. L.*, 455, 2d ed.; *Jacobson's case*, U. S. C. C., per Livingston, judge, 2 *City Hall Recorder*, 143; *Whart. Am. L. of Hom.*, 316, 317; *Burr. Cir. Ev.*, 678-680, and cases there cited, *id.*, 70-117; *United States v. Johnson*, *Wash. C. C. R.*, 372; *State v. Turner*, 1 *Wright, Ohio*, 20; *U. S. Cr. Dig.*, 321; *United States v. Gilbert*, 2 *Sumn. C. C. R.*, 27; *Commonwealth v. Webster*, 5 *Cush.*, 296; *People v. Green*, 1 *Park. Cr. R.*, 22; *People v. Videtto*, *id.*, 603.) The dictum of Lord Hale (2 *Hale's Pl. Cr.*, 290) was merely advisory, and though true as a general rule, is not, to the extent it purports, recognized as authority by modern courts.

II. The only principle upon which circumstantial evidence can be rejected as to the death, must be, to guard with greater certainty against, first, mistake; second, perjury. But direct evidence is subject to the same defects. The witness is liable to be mistaken in the person who commits the act, in the act committed, in the person upon whom it was committed and in the effect produced, whether it was a mere blow or a fatal stab. And if perjury is to be feared, it is more dangerous in direct than in circumstantial evidence.

III. Identifying the body is still more liable to mistake, and direct evidence, in many cases, is more unsatisfactory than a chain of strong consistent circumstances.

The counsel cited numerous cases where direct evidence had been relied on to identify remains, showing its uncertainty and error.

MASON, J.—The only question presented by the prisoner's counsel upon the bill of exceptions in this case is, whether, upon the trial of an indictment for murder, the *corpus delicti* can be proved by any other than direct evidence. The question is one of the highest importance, and I have

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examined it with the most anxious desire to arrive at a just conclusion and a correct determination of the question, and have bestowed upon it the most careful and deliberate consideration; and the result is a firm conviction that there is nothing in the results of experience, or in the nature and character of circumstantial evidence, which forbids the *corpus delicti* being proved and established by indirect evidence, any more than there is the guilt of the prisoner, or any other fact in the case. There is no more insecurity in the sanctions given to circumstantial evidence, as administered at the present day in the courts of England and this country, than there is in direct evidence; and every attempt which has been made to assail circumstantial evidence from the results of experience has done no more than to prove that it necessarily partakes of the infirmities incident to all human testimony. Every consideration which has been argued against it on this ground has only tended to detract from the credibility of human testimony generally, and has shown that the infallibility of human testimony applies to circumstantial only in common with other evidence. If the annals of the judicial history of England, from the time of William the Conqueror to the present day, could be put into a volume, it would show more convictions of innocent persons in capital cases by direct evidence, the results of fraud and perjury and honest mistake, than those upon circumstantial evidence alone. There is little doubt that if the catalogue of victims be confined to perjured witnesses alone, the result would show a greater number than can be imputed to the account of circumstantial evidence; and yet honest mistake and fallibility in direct and positive proof, would remain to claim its share.

The testimony of the senses cannot be implicitly relied on, even where the veracity of the witness is above all suspicion, and consequently, lamentable mistakes have occurred in direct and positive proof as to the identity of the prisoner. Sir Thomas Damont, an eminent English barrister, a gentle-

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man of acute mind and strong understanding, swore positively to the identity of two men whom he charged with robbing him in open day-light. But it was proved by the most conclusive evidence that the men on trial were, at the time of the robbery, at so remote a distance from the spot that the thing was impossible. The men were acquitted, and some time afterwards the robbers were taken, and the articles stolen found upon them. Sir Thomas, on seeing these men, candidly acknowledged his mistake, and, it is said, gave a recompense to the men who so narrowly escaped conviction. (*Rex v. Wood and Brown*, 28 *State Trials*, 819; *Wills on Cir. Ev.*, 31, 47, 48.) The case of *Rex v. Clinch and McAckley* (3 *Par. & Fon.*, 144), where the prisoners were convicted at the Old Bailey Sessions, in 1797, of the murder of one Frier, and executed. The identity of the prisoners was positively sworn to by a lady who was in company with the deceased at the time of the robbery and murder. It turned out afterwards that she was mistaken in the persons. (*Wills on Cir. Ev.*, 110.) An equally fatal mistake was made in the conviction of Robinson, at the Old Bailey, in July, 1824, upon direct and positive proof. (*Rex v. Robinson*, *Sess. Papers*, 1824; *Wills on Cir. Ev.*, 110.) A similar mistake was made by another prosecutor, a few months before the last mentioned case, where a young man was tried for highway robbery, and the prosecutor swore positively that the prisoner was the man who robbed him of his watch. (*Wills on Cir. Ev.*, 111.) *Grow's case* was a conviction for murder by an honest mistake in the witnesses of personal identity. They mistook Grow for Geddely, the real criminal. The remarkable case of Hoag, tried in the city of New-York, for bigamy, forcibly illustrates how easy it is to be mistaken upon a question of personal identity. (5 *C. H. Rec.*, 124.) Cases of this description might be greatly multiplied, but they would only serve to establish the fallibility of even direct and positive proof. The evidences of the identification of the dead body, in many

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of the cases referred to by the counsel for the people, upon the argument of this case, although classed under the head of direct evidence, are less satisfactory proof of the *corpus delicti* than the evidence in the case at bar furnishes. In the case of *Eugene Aram*, where the skeleton was found in a cave thirteen years after the murder, the proof of the identity of the body as that of Clarke was very faint, and but for the strong circumstantial evidence, a conviction could never have been justified. Charles I., after being much disfigured, was identified by a resemblance to the head upon the coins issued during his reign. The Marchioness of Salisbury, found among the ruins of Hatfield House, was identified by gold appendages to the artificial teeth. In the case of *Mary Martin*, the identification was by missing teeth. In the case of *Clowes*, the body was identified twenty-three years after the murder by the peculiarity of the teeth. In the recent case of *Dr. Webster*, in our own country, the identification of the body consisted in the evidence of a dentist as to the identity of the artificial teeth. There is little use in going over the cases of this description. The evidence of identity in very many of these and similar cases, which might be greatly multiplied, are, although classed under the head of direct evidence, far less satisfactory proof to establish the *corpus delicti* than many cases which rest entirely upon circumstantial evidence. It is no reason, therefore, for rejecting circumstantial evidence that a few cases can be found in the course of, perhaps as many centuries, where innocent men have been convicted upon this species of evidence, for the results of experience have demonstrated that the same accusation, with equal if not greater force, may be brought against direct evidence. It was well and beautifully said by Park, J., in *Rex v. Thurtell*, tried for the murder of Weare, at the Hartford assizes, in January, 1824, that "the Eye of Omniscience can alone see the truth in all cases; circumstantial evidence is there out of the question; but clothed as we are with the infir-

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mities of human nature, how are we to get at the truth without a concatenation of circumstances? Though, in human judicature, imperfect as it must necessarily be, it sometimes happens, perhaps in the course of one hundred years, that in a few solitary instances, owing to the minute and curious circumstances which sometimes envelope human transactions, error has been committed from a reliance on circumstantial evidence; yet this species of evidence, in the opinion of all those who are most conversant with the administration of justice, and most skilled in judicial proceedings, is much more satisfactory than the testimony of a single individual who has seen the fact committed." (1 *Cow. & Hill's notes*, 393.)

It was said, by Washington, J., in *The United States v. Johns* (1 *Wash. C. C. R.*, 372), that circumstantial evidence is sufficient, and is often more persuasive than the positive evidence of a witness who may be mistaken, whereas a concatenation and a fitness of many circumstances, made out by different witnesses, can seldom be mistaken or fail to elicit the truth." It was said, by Livingston, J., that "the rule, even in a capital case, is, that should the circumstances be sufficient to convince the mind and remove every rational doubt, the jury is bound to place as much reliance on such circumstances as on direct and positive proof, for facts and circumstances cannot lie." (*Jacobson's case*, 2 *C. H. Rec.*, 143; 1 *Cow. & Hill's Notes*, 308.) Burnett says: "*Circumstances are inflexible proofs.*" (*Burn. Com. L. Scotland*, 523.) Paley says: "Circumstances cannot lie." (*Prin. Mor. & Pol. Phil.*, book 6, ch. 9.) Burke, the distinguished statesman and orator, has said that "when circumstantial proof is in its greatest perfection, that is, when it is most abundant in circumstances, it is much superior to positive proof." (2 *Burke's Works*, 624.) Paley has declared, and with more caution, that "a concurrence of well authenticated circumstances composes a stronger ground of assurance than positive testimony, unconfirmed by circumstances, usually

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affords." (*Prin. Mor. & Pol. Phil.*, book 6, ch. 9.) It was said, by Baron Legge, upon the trial of Mary Blandy for murder, that where "a violent presumption necessarily arises from the circumstances, they are more convincing and satisfactory than any other kind of evidence, because facts cannot lie." (28 *State Trials*, 1187.) Mr. Justice Buller stated to the jury, in his charge in the trial of John Donellan for murder, that "a presumption which necessarily arises from circumstances is very often more convincing and satisfactory than any other kind of evidence, because it is not within the reach and compass of human abilities to invent a train of circumstances which shall be so connected together as to amount to a proof of guilt without affording opportunities of contradicting a great part if not all of those circumstances." (*Gurney's report of trial.*) The opinions of judges of similar import might be multiplied to almost any extent, but the character and force of circumstantial evidence is so well defined and recognized by all the elementary writers upon evidence that it becomes unnecessary to pursue it. Starkie, in speaking of circumstantial evidence, says: "It is, in its own nature capable of producing the highest degree of moral certainty." (3 *Stark. Ev.*, 479, 480.) The nature and character of circumstantial evidence are as well elucidated and described by Wills, in his admirable book on circumstantial evidence, as in any author which has fallen under my observation. He maintains that circumstantial evidence is capable of producing an equal degree of moral certainty with direct evidence; and Burrill, in his most excellent treatise on circumstantial evidence, maintains the same claim for it. In short, there is not a writer of any respectability upon the principles of evidence but what admits that circumstantial evidence has the inherent capacity to produce moral certainty in its results. It is a principle of circumstantial evidence that it is never permitted to rise to the dignity of proof until it does produce moral certainty. It is correctly said by Mills that a presumption which neces-

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sarily arises from circumstances cannot admit of dispute and requires no corroboration. He adds: "If evidence be so strong as necessarily to produce certainty and conviction, it matters not by *what kind* of evidence the effect is produced, and the intensity of the proof must be precisely the same whether the evidence be direct or circumstantial. It is not," he adds, "intended to deny that circumstantial evidence affords a safe and satisfactory ground of assurance and belief; nor that, in many individual instances, it may be superior in proving power to other individual cases of proof by direct evidence." (*Wills Cir. Ev.*, 29, 45.) It was said by Lord Erskine, with the strictest philosophical truth, in the *Banbury Peerage case*, that "proof is nothing more than a presumption of the highest order." (*Id.*, 48.) It is equally so, whether the evidence be direct or circumstantial. If a witness swears directly to a fact, as a general rule, we regard the fact as proved, because we presume the witness has told the truth; yet it is but a presumption after all. Having considered thus far the nature and character of circumstantial evidence, let us inquire whether it has not sufficient proving power to establish the *corpus delicti* in a charge of murder.

Lord Hale has often been referred to as authority against the rule, and in some instances has been followed as authority, denying the admissibility and competency of such evidence to establish the *corpus delicti* in such a case. Lord Hale said: "I would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the dead body found, for the sake of two cases," which he states, of wrong convictions, where the body was not produced or found and identified. (2 *Hale*, 290; 2 *Stark. Ev.*, 513.)

Now the only reason assigned by Lord Hale against the competency of this species of evidence, if it can be regarded an opinion against its competency, was that, in two instances, convictions had been had upon circumstantial evidence to establish the *corpus delicti*, when it turned out afterward

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that the persons were innocent. This is no argument for rejecting this species of evidence, for the same accusation can be brought against the proof of the guilt of the prisoner by circumstantial evidence, where the *corpus delicti* has been clearly established by direct evidence, and the same charge can be brought against direct evidence, as we have shown. This remark of Lord Hale, although it has been often quoted by judges, and has found its way into the elementary books upon evidence and of publicists upon criminal law, yet it has not been generally regarded as authority, but at most as merely advisory, and the rule as stated by him is now generally repudiated as unsound. It is stated by Burrill, in his valuable *Treatise on Circumstantial Evidence*, that "the death may be inferred from such strong and unequivocal circumstances as renders it morally certain, and leaves no ground for reasonable doubt." (*Burr. Cir. Ev.*, 680.) It is said by Wills, in his most estimable *Essay on Circumstantial Evidence*, that it is a fundamental and inflexible rule of legal procedure, and of universal obligation, to require satisfactory proof of the *corpus delicti*, either by direct evidence or by cogent and irresistible grounds of presumption. (*Wills Cir. Ev.*, 156, 178.) He says again (*p.* 185), after quoting the remark of Lord Hale, "that to require the discovery of the body, in all cases, would be unreasonable, and lead to absurdity and injustice, and is, indeed, frequently rendered impossible by the act of the offender himself. The fact of death, therefore," he adds, "may be inferred from such strong and unequivocal circumstances of presumption as render it morally certain and leave no ground of reasonable doubt." (*Id.*, 163-185, 3d *Lond. ed.*) Greenleaf adopts the rule of Wills. He says that even in the case of homicide, though ordinarily there ought to be the testimony of persons who have seen and identified the body, yet this is not indispensably necessary in cases where the proof of death is so strong and intense as to produce the full assurance of moral certainty. (3 *Greenl. Ev.*, § 30.) He cites the remark of

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Lord Hale (*id.*, 121, § 131), and regards it as only advisory, and repudiates it as a rule. Starkie (*vol.* 1, 511, 6th *Am. ed.*) quotes Lord Hale with approbation, and declares the rule, in unqualified terms, to be that the *corpus delicti* can only be proved by direct evidence of the fact, or by discovery and inspection of the dead body. He has, however, referred to the subject again (2 *id.*, 513), and corrected himself in the employment of the following language: "It has been laid down by Lord Hale, as a rule of prudence in cases of murder, that, to warrant a conviction, proof should be given of the death by evidence of the fact or the actual finding of the dead body." But he adds, "although it be certain that no conviction ought to take place unless there is the most full and decisive evidence as to the death, yet it seems that actual proof of the finding and identifying of the body is not absolutely essential." And it is evident that to lay down a strict rule "to that extent might be productive of the most horrible consequences." (2 *Stark. Ev.*, 513, 6th *Am. ed.*) It is stated in *Russell on Crimes*, that it has been holden as a rule that no person should be convicted of murder unless the body of the deceased has been found; and then, after quoting the language of Lord Hale, he adds: "But this rule, it seems, must be taken with some qualifications; and circumstances may be sufficiently strong to show the fact of murder though the body has never been found." (1 *Russ. on Cr.*, 567.) It is said by Chitty, in his *Criminal Law*, that "It is said to be a good general rule that no man should be found guilty of murder unless the body of the deceased is found, because instances have arisen of persons being executed for murdering others who have afterward been found to be alive. But this rule must be taken rather as a caution than as a maxim to be universally observed, for it would be easy, in many instances, so to conceal the body as to prevent it from being discovered." (1 *Chitty Cr. L.*, 738; 2 *Arch. Cr. Pl.*, 208, *Waterman's ed.*) The following authorities will be found fully to establish the rule that where the discovery of

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the body cannot be had, the *corpus delicti* may be proved by circumstantial evidence, where the facts and circumstances are so strong as to render it morally certain and leave no ground for reasonable doubt. (*Whart. Am. L. of Homicide*, 316, 317; *Burr. Cir. Ev.*, 678-680, 70-117; 3 *Cow. & Hill's Notes*, part 1, 470-472, 562-564, new ed; *Whart. Am. Cr. L.*, 284-286; 2 *Arch. Cr. Pl. and Pr.*, 134, 135, *Waterman's ed.*; *Barb. Cr. L.*, 455, 2d ed; *United States v. Johns*, 1 *Wash. C. C. R.*, 372; *State v. Frier*, 1 *Wright's Ohio R.*, 20; *United States v. Gilbert*, 2 *Sumn. C. C. R.*, 27; *Commonwealth v. Webster*, 5 *Cush.*, 296; *Wills Cir. Ev.*, 185, 195.) In the cases of *The United States v. Gilbert* (*supra*), Justice Story, having this rule of Lord Hale pressed upon him, said: "The proposition cannot be admitted as correct, in point of common reason or of law, unless courts of justice are to establish a positive rule to secure persons from punishment who may be guilty of the most flagitious crimes. In the case of murders committed on the high seas the body is rarely, if ever found, and a more complete encouragement and protection for the worst offences of this sort could not be invented than a rule of this strictness. It would amount to universal condonation of all murders committed on the high seas." I assume, therefore, that the *corpus delicti*, as well as the guilt of the prisoner, may be proved by circumstantial evidence. It is undoubtedly true, as a general rule, that the dead body ought to be found and identified; but, like all other general rules, it has its exceptions. It becomes important, then, to inquire what are the exceptions to this general rule. There is no particular class of cases that can be said in law to form an exception. The application of the familiar and well settled rule in regard to allowing circumstantial evidence to prove a fact, is the only one that can be recognized in such a case; that rule is that circumstantial evidence can never be resorted to except where direct evidence is unattainable. (*Wills Cir. Ev.*, 47.) Starkie says, circumstantial evidence ought in no case to be relied on where direct or positive

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evidence which might have been brought by the prosecutor is willfully withheld. (1 *Stark. Ev.*, 515; *Wills Cir. Ev.*, 47.) It is not, then, allowed to prevail to the conviction of an offender simply because it is politic, but because it is in its own nature capable of producing the highest degree of moral certainty in its application. (1 *Stark. Ev.*, 494, 495.) The mistaken policy which led some of the writers on the civil and common law to modify their rules of evidence according to proof incident to particular crimes, and to adopt the execrable maxim that the more atrocious was the offence the slighter was the proof necessary, has no place in the wise common law principles of evidence as administered in England and this country. (*Wills Cir. Ev.*, 157, 178.) That no consideration of supposed expediency is permitted to supersede the immutable obligations of justice is a wholesome maxim of our common law rules of evidence. (*Id.*, 173.) Many of the continental codes of Europe prescribe imperative formulæ descriptive of the kind and of the amount of evidence necessary to constitute legal proof. (*Id.*, 211, 236.) But this doctrine is wholly repudiated by the common law principles of evidence. It does not attempt to fix with arithmetical exactness a common standard of proof, which shall influence with unvarying intensity and affect the minds of all men alike. (*Id.*, 236.) The common law principle of evidence regards such rules not merely as harmless and superfluous, but as positively pernicious and dangerous to the cause of truth; and while they operate as snares for the conscience of the judge, they are unnecessary for the protection of the innocent, and effective only for the impunity of the guilty. (*Id.*, 236, 237.) In strict accordance with these principles, Mr. Starkie, in discussing the principles of circumstantial evidence, says: "What circumstances will amount to proof can never be matter of general definition. The legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. On the one hand, absolute metaphysical and demonstrative certainty is not

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essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt." (1 *Stark. Ev.*, 514; 3 *id.*, 514; 1 *Cow. & Hill's Notes*, 308.) Greenleaf says it is obvious that upon this point no precise rule can be laid down, except that the evidence ought to be strong and cogent. (3 *Greenl. Ev.*, 32, § 30.) The doctrine is affirmed by Wills in the strongest terms. (*Wills Cir. Ev.*, 21, 26, 36, 41, 42.) In the case at bar there was no direct evidence of the *corpus delicti*, and as it was most evident that none could be adduced in the case, I am of opinion, for the reasons above stated, that I was right in saying to the jury that the *corpus delicti* might be proved by circumstantial evidence, when the evidence is so strong and intense as to produce the full certainty of death, or, in other words, that the death might be inferred from such strong and unequivocal circumstances as render it morally certain and leave no ground for reasonable doubt. I cautioned the jury that before they could find this issue against the prisoner they must be satisfied from the evidence in the case that it was established by presumptive evidence of the most cogent and irresistible kind; that it was established by circumstances proved so strong and intense as to produce the full certainty of death. Under this charge the jury responded in a verdict of guilty. It was an impartial verdict upon the evidence in the case, and accorded with my own convictions of the case, and entertaining the most deliberate opinion that no principle of law was violated upon the trial, and that no injustice was done the prisoner in the verdict of the jury, I am of opinion that a new trial should be denied.

GRAY, J. The only question here presented is as to the sufficiency of circumstantial evidence to establish the criminal act charged in the indictment. It is stated as a rule, by some elementary writers of high authority upon questions of evidence, that however strong or numerous the circum-

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stances may be to establish a fact that a murder has been committed, they avail nothing unless the death be first distinctly proved by inspection of the body. (4 *Bl. Com.*, 359; *Stark. Ev.*, 2d ed., 509.)

This rule originated with Sir Matthew Hale, who said he would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead, for the sake of two cases. (2 *Hale's P. C.*, 290.) I have examined those cases, and although there is much in them calculated to induce courts to caution jurors to consider with the greatest care and scrutiny the evidence submitted for their consideration, to keep in mind the legal presumption of innocence and give to the accused the benefit of every reasonable doubt, yet I am not satisfied that they warrant a court in declaring that they will not carry into execution the verdict of a jury founded upon evidence, to the admissibility of which there is no possible objection, and which comes fully up to the legal test of proof in every other case and upon every other question that can arise, however highly penal the consequences may be. In one of the cases referred to by Lord Hale, two things occurred out of the ordinary course of legal proceedings, without which a conviction would not have ensued. It was the well known case of an uncle charged with murdering his niece; he was admonished, by the justices before whom he was examined, to find out the child by the next assizes; not being able to comply with judicial admonition he feared the consequence, and to avoid it brought another child like her in person and years, having appareled her like the true child. The deception was discovered, and upon the presumption arising from the child's absence and the fraudulent substitution, he was convicted and executed. It was afterwards discovered that the missing child was living,

The melancholy result in that case may well be attributed to the extraordinary demeanor of the justices and the

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accused, and not to any defect in the rule of evidence adopted.

The other is a case, given by Lord Hale, of a man being convicted of the murder of another. The latter had been a long time missing, and was supposed to have been murdered by the accused and consumed by him to ashes in an oven. The accused was convicted and executed, and the latter returned within a year.

It is enough to say of this case, that under the rule now sought to be enforced by the prosecution, properly administered and the accused reasonably well defended, no such conviction could at this age be had. That there have been other cases of conviction where the party supposed to be murdered was, at the time of the conviction, alive, is undoubtedly true.

We are therefore called upon, on account of there having been once, perhaps in a century, such an instance, to hold that no conviction can be had unless the act of killing be proved by the evidence of one or more who saw it or the dead body be found. Should this be done, we should, for the same reason, where the dead body is found, hold that the crime of killing and the discovery of the author could not be established by circumstantial evidence. The danger in the latter case is fully equal, if not greater, than in the former, and in the latter case a two-fold evil would be almost necessarily the result, viz., "the escape of the guilty and the punishment of the innocent." Past experience has shown that very many instances have occurred in which honest witnesses have testified positively to a fact which subsequent developments have shown not to have existed. Verdicts have been the result of evidence given by perjured witnesses. In either case, we do not know whether the witness speaks the truth, but presume, from the reasonableness of his statement, his deportment upon the stand, and the fact that he is not contradicted, or in any respect impeached, that he has testified truly, and act accordingly.

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Although circumstantial evidence may technically, in some respects be regarded as inferior or secondary in its character, it is so only when it appears that direct evidence is withheld, and then only for the purpose of avoiding the suspicion that would otherwise rest upon it from the mere circumstance that attainable, direct evidence is withheld. It has therefore sometimes been held that direct evidence should first be produced; both are certainly more conclusive than either. Nevertheless, such evidence is not in any sense inferior to direct evidence; many able jurists have held that a combination of circumstances, so connected with each other as to form a chain of evidentiary facts, is more convincing and less liable to suspicion than what is ordinarily termed direct evidence.

To secure safety in the administration of justice, care is taken, in proportion as the controversy rises in importance, to guard against mistakes and injustice. In criminal trials, the interest at stake being greater, the law has justly thrown around the accused guards against erroneous conclusions to be drawn from evidence, whether direct or circumstantial, which renders it necessary that a higher degree of certainty should be arrived at than in civil cases. No possible objection can be sustained to the admissibility of circumstantial evidence; no one, upon judicial authority, doubts its competency when a death has occurred, to prove not only that the person was killed without authority of law, but to identify the murderer.

Our limited intelligence alone, without the aid of wisdom derived from the experience of those by whom rules of evidence have been devised, affords abundant proof that no rules of evidence adapted to the wants of society by the human mind are infallible; differences of opinion are entertained as to whether direct or circumstantial evidence is the least liable to error. A learned commentator says, with great truth, that "each have their peculiar advantages and characteristic dangers"; to reject either under all circum-

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stances as insufficient, would result in the clearest injustice. If fallible minds should reject all evidence not infallible, there would be an end to the administration of justice, civil or criminal.

Necessity has forced upon us rules of evidence, and the protection of civil life is the highest object of our penal laws, and that, to a great extent, is accomplished by a dread of punishment; and notwithstanding the consequences to the accused are incalculably serious, yet if the *corpus delicti* be established by circumstances which come up to the best of proof, so strong and intense as to convince the understanding and consciences of a jury of the full certainty of death, though the dead body be not found, I am unable to discover upon what principle of justice a court can refuse to pronounce judgment upon the verdict. (3 *Greenl. on Ev.*, 32, § 30.)

Mr. Wills, in his valuable treatise upon *Circumstantial Evidence*, says, that to require the production of the dead body in all cases would be unreasonable, and lead to absurdity and injustice; and that the death may be inferred from such strong and unquestionable circumstances of presumption as render it reasonably certain, and leave no ground for reasonable doubt. (*Wills on Cir. Ev.*, 2, 203.)

Were it not so, says Bentham, a murderer, to secure himself with impunity, would have no more to do but to consume or decompose the body by fire, by lime, or by any other known chemical menstrua, or to sink it in an unfathomable part of the sea. (3 *Benth. Jud. Ev.*, 243.) Justice Story, in the case of *The United States v. Gilbert and others* (2 *Sumn.*, 19, 27), said of the rule contended for by the counsel for the prisoner, "It certainly cannot be admitted as correct, in point of common reason or of law, unless courts of justice are to establish a positive rule to screen persons from punishment who may be guilty of the most flagitious crimes. In cases upon the high seas, the body is rarely if ever found, and a more complete encouragement

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and protection for the worst of offences could not be invented than a rule of this strictness. It would amount to a universal condonation of all murders committed upon the high seas."

The defendant's child, at the time of his trial, had been missing over eleven years, under circumstances that fully justified the inference that he had put it to death, and sunk its body and that of its mother, in Cayuga lake. Its clothes with those of its mother, were pawned by him in Chicago, soon after the child and mother were missing, under the assumed name of James H. Revilee; he then said they had died on Illinois river, south of Chicago.

The party to whom they were pawned, not hearing from him, opened the trunk containing the clothes, and found in it cards inscribed, James H. Ruloff, and on a separate paper, these words, "Oh, that dreadful hour"; also a lock of hair labeled either Harriet's or Mary's hair, the witness thought Harriet's.

The strong force of circumstances against him pressed him to the proof of his assertion that his child had died in Illinois, or that it was seen after the time it was missing; he made no effort to do either, but reposed himself entirely upon the inability of the prosecution to produce the dead body of his child.

I see no ground for interfering with the verdict.

BALCOM, J. (Dissenting.) The defendant was convicted of the murder of his infant daughter, at a Circuit Court, held in the county of Tioga, in October, 1856. He now moves for a new trial upon, a bill of exceptions.

It is claimed on the part of the defendant that the judge who presided on the trial erred in refusing to instruct the jury that the defendant could not be convicted of murder, for the reason that there was no direct evidence of the death or murder of his infant daughter; and in charging that the

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jury might infer, presume and find, without direct proof, the death and murder of the infant daughter.

The proof shows that the defendant's infant daughter and its mother disappeared very mysteriously from the defendant's residence, in Tompkins county, in June, 1845, and that neither of them has since been found or heard of, although the most diligent search and inquiry have been made for that purpose by the people of Tompkins county and the relatives of the absent daughter and mother, on the mother's side.

The defendant's conduct, before and at the time the daughter and its mother disappeared from his house, and subsequently thereto, was such as to create a very strong suspicion that they are both dead and that he murdered them; and from such conduct, and other facts and circumstances disclosed by the evidence in the case, the jury have found him guilty of the crime of murdering his daughter, for which only he was tried.

The evidence is such that it is barely possible, though highly improbable, that the defendant's daughter is still alive. It is, however, so strong against the defendant on every point which it was necessary for the people to establish to show him guilty, that if a conviction for murder should be allowed in any case without certain evidence that the person supposed to be murdered is dead, we ought not to disturb the finding of the jury that he is guilty.

Should a conviction for murder be permitted in any case without direct and certain evidence that the person is dead whom it is supposed has been murdered, is the only question presented for our consideration in this case.

It is settled, both upon principle and authority, that the body of the murdered person need not always be found to authorize a conviction of the accused. Proof that the prisoner threw a person overboard from a vessel at sea, under such circumstances that it would be impossible for him to escape drowning, has been held sufficient evidence of the

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death of the person so thrown overboard to warrant the conviction of the prisoner without finding the dead body. So proof that the prisoner had cast a person into a blazing furnace, from which he could not escape, the heat thereof being sufficient to entirely consume the body, would render it unnecessary for the prosecutor to give evidence of the finding of the body of the person thus destroyed. The evidence in such cases being direct and certain that the absent or missing person is dead, establishes the basis of the *corpus delicti*; and then whether the throwing of the person into the sea or casting him into a blazing furnace was murder or manslaughter, or done in self-defence, may be inferred from circumstances.

The rule laid down by Lord Hale is, that he "would never convict any person of murder or manslaughter unless the fact be proved to be done, or at least the body found dead," and judges have seldom violated this rule without committing judicial murder. It is not to be denied that innocent persons have been convicted of murder when the bodies of the murdered persons were found; but this fact should admonish us against relaxing Lord Hale's rule, instead of inducing us to sustain a conviction where, conceding that all the witnesses whose testimony is relied upon to establish the death of the absent person supposed to be murdered have told the truth, the whole truth, and nothing but the truth, and still it be possible that such person is living. I cannot concur in establishing the doctrine that human life may be taken for an alleged murder when the conclusion that a murder has been committed is drawn from the sudden and unaccountable disappearance and long continued absence of the person supposed to be murdered, or from other circumstances, which may be all true and yet no homicide have been committed by any person.

The evidence that the person whom it is alleged has been murdered is dead must be certain, and it must be such as to leave no room for the existence of any doubt whatever that

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such person is dead, before a conviction for the murder of such person can safely be permitted. It will not do to presume from circumstances that an absent person is dead, and then build the further presumption upon it that such person has been murdered. Persons accused of murder must be proved to be guilty, by certain and reliable evidence, before they can be lawfully convicted. "The case must be such as to exclude to a moral certainty every other hypothesis but that of the guilt of the party accused." The case does not do this when there is the least uncertainty as to whether the person alleged to be murdered is dead. It is infinitely better for society that guilty persons should sometimes escape deserved punishment than for courts to establish a precedent that may be used to deprive innocent persons of life.

I cannot concur in sustaining the verdict in this case, because the evidence is such that it is possible that the defendant's daughter is yet living. That it is extremely improbable that she is living will not do. The evidence must be certain that she is dead before the defendant can be lawfully convicted.

I think the judge should have instructed the jury to acquit the defendant, and that for his refusal to do so the verdict should be set aside and a new trial granted to the defendant, to be had at the Tioga Circuit.

New trial denied.

SUPREME COURT. Kings Special Term, June, 1857. Before
Birdseye, Justice.

THE PEOPLE *v.* JOHN MOORE and others.

A commitment issued upon a conviction before a Court of Special Sessions need not contain a statement that the defendant, when brought before the magistrate, requested to be tried before a Court of Special Sessions, nor that, having been required by the magistrate to give bail, the defendant omitted for twenty-four hours to do so, nor whether the defendant demanded a jury.

Such statements being no longer necessary in the record of conviction (2 *R. S.*, 771, § 38), are not required in the *mittimus*, which is merely the writ of execution for the purpose of enforcing the judgment.

THIS was a *certiorari* to the county judge of Westchester county to review his decision, upon a *habeas corpus*, refusing to discharge the defendants from the custody of the sheriff of that county.

W. H. Pemberton (District Attorney), for the people.

W. F. Purdy, for the defendants.

By the Court, BIRDSEYE, J.—The defendants were tried before Thomas Smith, a justice of the peace of Westchester county, at a Court of Special Sessions, and, having been convicted, were sentenced to imprisonment in the county jail, and were committed accordingly.

The main objection to the commitment, on the argument, was, that the commitment did not show facts sufficient to confer jurisdiction on the committing magistrate. It does not set forth that the defendants, when brought before him, requested to be tried before a Court of Special Sessions (2 *R. S.*, 711, § 2); or that, having been required by the magistrate to give bail, they omitted for twenty-four hours to do so (*id.*, § 3); or whether they demanded a jury. (*Id.*, 712, § 8.)

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No statement on that subject, however, need be made in the record of conviction. (*The People v. Goodwin*, 5 Wend., 251.) By the *Revised Statutes* (p. 711, § 38), the requisites for the record of conviction before a Court of Special Sessions are prescribed. In any other county than New-York this record or certificate shall "briefly state the offence charged and the conviction and judgment thereon, and, if any fine has been collected, the amount thereof and to whom paid."

Such being the only essential requisites of the record of the judgment, as prescribed by the statute, I am unable to see how any greater minuteness or particularity can be required in the *mittimus*, which is merely the writ of execution for the purpose of carrying the judgment into execution. Admitting that the Court of Special Sessions is a tribunal of special and limited jurisdiction, and that the facts conferring jurisdiction must be shown, the statute has changed the rule as to the record of the judgment in express terms. Now, a record which states not one of these facts is made "sufficient." The execution certainly cannot be required to state any more than the judgment. By implication, the necessity of averring the jurisdictional facts in the writ is dispensed with by the provision that the record need not set forth those facts.

Certainly no great hardship or harm can arise from the application of this rule. If there be any substantial defect in the proceedings to acquire jurisdiction, that must now be affirmatively shown by the defendants. The burthen of the proof is now imposed upon them. But for this provision of the statute they could have kept still and availed themselves of any defect in the statement of the proceedings to be made up by the magistrate. Now, they are required to show that there was a defect in the proceedings themselves. When the number of these courts is considered, and the frequency of the proceedings before them, together with the obvious fact that a large proportion of the magistrates presiding in these courts are men not familiar with the techni-

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calities of the law, the propriety and necessity of such a relaxation of the rule above referred to at once become obvious.

The decision of the county judge, refusing to discharge the prisoners, was correct and must be affirmed.

SUPREME COURT. New-York General Term, June, 1857. *Mitchell, Roosevelt and Peabody*, Justices.

THOMAS THOMPSON, plaintiff in error, v. THE PEOPLE,
defendants in error.

Where a juror is challenged to the favor, the triors are to decide whether he is, at the time of the trial, "altogether indifferent;" the inquiry is not confined to the state of the juror's mind before coming to court, but if anything has occurred in court which has produced on his mind an impression of the guilt or innocence of the prisoner, it is a sufficient reason for finding the juror not to be indifferent between the parties.

THIS was a writ of error to the Court of General Sessions for the city and county of New-York.

On the 13th of April, 1856, the prisoner, who had been indicted for burglary, was arraigned and pleaded guilty, and was sentenced, by the recorder, to five years' imprisonment in the state prison. Before the sentence was entered upon the records of the court, the prisoner was permitted to withdraw his plea of guilty, and to put in a plea of not guilty. On the next day the cause came on for trial before Elisha P. Capron, city judge. After several persons had been called as jurors and set aside on challenges for principal cause and favor, Charles Van Dyke was called as a juror, and appeared, and having been challenged to the favor by the counsel for the prisoner, triors were appointed and sworn, and the said Charles Van Dyke was sworn to testify as to his competency to serve as a juror. He testified, among other things, that the fact of the prisoner's

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having pleaded guilty the day before, and being sentenced to the utmost extent of the law, had produced an impression on his mind as to the guilt of the prisoner. This testimony having been objected to by the district attorney, it was, on his motion, stricken out by the court, to which decision the counsel for the prisoner excepted.

Defendant's counsel asked the court to charge the triors that they had a right to take into consideration, in determining whether or not the juror stood indifferent, any impression upon the juror's mind formed from the proceedings in court at the time the prisoner put in his plea of guilty and was sentenced to imprisonment in the state prison. The court refused to charge this proposition, to which decision of the court, refusing to charge said proposition, the counsel for the prisoner duly excepted. The triors found the challenge not true, and the said Charles Van Dyke was sworn as a juror to try the cause. After several more persons had been called as jurors, and set aside on challenge for principal cause and favor,

John C. Bishop was called as a juror and appeared, and having been challenged for favor on the ground that he had formed and expressed an opinion upon the guilt or innocence of the prisoner, by the counsel for the prisoner, and such challenge having been denied by the counsel for the people, and tried by triors duly appointed and sworn, and the said John C. Bishop having been sworn to testify the truth as to his competency to serve as a juror, testified as follows :

Question. Has what you have heard in court to-day produced any impression upon your mind as to the guilt or innocence of the prisoner?

Answer. I have heard the testimony given by other jurors on their examination in court to-day; I have also heard others here in court speak upon the subject of the prisoner's guilt or innocence.

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The district attorney contended that the foregoing answer was inadmissible as evidence, and asked the court to strike it out. The court granted the motion of the district attorney to strike out said answer. To which said decision of the court the prisoner's counsel duly excepted.

Question. Have you any impression, formed at any time, resting on your mind as to the guilt or innocence of the prisoner?

This question was objected to by the district attorney, on the ground that the prisoner's counsel had no right to inquire as to impressions upon the mind of the said Bishop, formed from the proceedings in the court on that or the previous day. The court decided that the question should be limited to impressions formed before the proceedings in court on that and the previous day had taken place, and that any impressions resting upon the mind of the said Bishop, which were formed from such proceedings in court, were not a proper subject of inquiry. To said decision, and each and every part thereof, the counsel for the prisoner then and there duly excepted.

The jury having found the prisoner guilty, he was sentenced to imprisonment in the state prison for the term of five years.

H. L. Clinton, for the prisoner.

I. The court erred in overruling the question put by appellant's counsel to the juror, Van Dyke: "*Question.* From all these circumstances, have you an impression upon your mind as to whether or not the prisoner is guilty?" On the previous day the prisoner pleaded guilty, and was sentenced to the utmost extent of the law. The following language, used by the Supreme Court, in *People v. Bodine* (1 Denio, 308), is applicable to the point here involved: "Indeed, any and every fact or circumstance, from which bias, partiality or prejudice may justly be

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inferred, although very weak in degree, is admissible in this issue." (*Id.*, 281; *Freeman v. People*, 4 *id.*, 9; *People v. Mather*, 4 *Wend.*, 421; *People v. Honeyman*, 3 *Denio*, 121; *People v. Carnel*, 2 *Park. Cr. R.*, 272.)

II. The court below erred in refusing to charge the triors, that, in determining whether or not the juror stood indifferent, they had a right to take into consideration any impression upon the juror's mind, formed from the proceedings in court at the time the prisoner put in his plea of guilty, and was sentenced to imprisonment in the state prison.

III. The court below erred in striking out the answer of the juror, John C. Bishop.

A. Oakley Hall (District Attorney), for the people.

The prisoner pleaded guilty to an indictment for burglary, and, *in favorem libertatis*, was permitted to withdraw his plea and was duly convicted by a jury. Of his full guilt there is no question. There are simply technical exceptions to challenges, and to the indorsement of the indictment.

One of the exceptions comes to a question in criminal cases, which are tried quite as much out of court as in court, that it is very important to settle, viz., whether from any act of a prisoner or declaration of counsel in court, during progress of trial, very possible to be made for the purpose of influencing a juror, a bias or impression of guilt thus formed can become ground for a challenge other than the arbitrary one of peremptory.

I. Challenges to the favor, in these instances, were upon impressions as to the guilt or innocence of the prisoner. Now these impressions are always upon knowledge or hearsay of the facts or circumstances of the case out of which guilt or innocence proceed. (*People v. Bodine*, 1 *Denio*, 281. and *law passim.*) 1. Challenge to the favor is for matters that have happened out of court. If matters occur in court, which the prisoner thinks may be prejudicial to his case, he has his

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arbitrary challenge. To lay down any other rule would be to convert the court room into a place where, by the ingenuity or artifice of counsel or prisoner, he might continue from day to day and term to term to prejudice and bias every juror called to the stand. When the law says every man must be indifferent (speaking as to favor), it means this, that any opinion, bias or prejudice must arise from some acquaintance with the facts or circumstances of the case. You cannot predicate guilt or innocence in law of anything but matters of evidence. A man being a phrenologist, or a physiognomist, or a spiritualist, might form an impression of guilt from the looks, bearing and demeanor in court of a prisoner. But shall the already too elastic rules of challenge exclusion be stretched to shut such a juror from the box? I once knew a counsel ask the question, "Have you an impression that the prisoner is guilty because I am his counsel?" The Appellate Court will at once perceive that the two jurors were allowed to be questioned as to their impressions prior to coming into the court room or as to impressions formed out of the court room.

By the Court, MITCHELL, J.—Thompson was tried at the General Sessions, and found guilty of burglary: he brings a writ of error to reverse the judgment. On the thirteenth of April, he was brought into court and pleaded guilty, and was thereupon sentenced to five years' imprisonment; but before the sentence was entered on the records, he was allowed to withdraw his confession and to plead not guilty; his trial was appointed for the following day. Two jurors were challenged for favor, as having formed and expressed an opinion. The court ruled that any impression of the guilt of the prisoner, which they had formed from the proceedings in court, on the thirteenth of April, was not a proper subject of inquiry; to this ruling the defendant excepted. In the language of Chitty (1 *Chit. Cr. L.*, 544), "the question to be tried" (in such case) "is, whe-

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ther the juryman is altogether indifferent, as he stands unsworn." The time thus fixed is the period at which the trial of his indifferency takes place before the triors; the issue submitted to the triors is in the present tense: "is he indifferent," and the finding is to be in the present tense, "that he is or is not indifferent." No exception is stated to this rule, and none can be justly engrafted on it. The accused is entitled to a trial by men who do not yet believe him guilty, or his trial is a sham. The confessions made by the prisoner, any time before the day when he was brought into court, could have produced no stronger impression of his guilt, than his plea of guilty at that time, yet an impression from such a source would have excluded the juror beyond doubt; so that the acts or confessions of the accused do not form an exception to the rule. Suppose each juror had actually come to the conclusion that the prisoner, being of sound mind, could not have pleaded guilty without being guilty, and that he was in fact guilty, can it be said (and that is the only question here) that the triors would not have had cause to find them not indifferent? Or the question may be put in a still stronger form: if the executive were satisfied that a man had been convicted by jurors who had thus prejudged the case, would he not feel bound to pardon the prisoner? The prosecution would not be allowed to prove the prisoner's confession of guilt as evidence on the trial in chief; yet by admitting jurors, on whom it had produced a belief of the guilt of the prisoner, it has its full effect as evidence, without the possibility of the prisoner repelling it.

The judgment should be reversed, and a new trial be had at the General Sessions.

Judgment reversed and new trial awarded.

SUPREME COURT. New-York General Term, June, 1857. *Mitchell, Roosevelt and Peabody, Justices.*

CHARLES WILLS and WILLIAM CONLEY, plaintiffs in error, v.
THE PEOPLE, defendants in error.

Form of an indictment for feloniously receiving and having stolen property, with counts charging some of the defendants as accessories.

On the trial of an indictment for feloniously receiving and having stolen goods, where a witness called by the prosecution had testified that he called on the defendants and found the stolen property in their possession, and purchased it of them for a much less sum than its value, and had, at the time, in his possession, a memorandum of the goods which had been stolen, it is competent for the prosecution, for the purpose of showing the true position of the witness in the transaction, to show by him that he had previously received the memorandum from the person from whom the property had been stolen, and that he also got the money with which he bought the property from the person from whom it had been stolen.

What facts and circumstances are sufficient to justify the court in refusing to discharge one of the defendants, on the trial of such an indictment, where a clear case of guilt was made out against the other defendant, both being claimed to have acted in concert, stated in the history of the case, and commented on by MITCHELL, J.

Where the bulk of the stolen goods was found, in Williamsburgh, in a house apparently kept for storing and concealing goods, but a portion of the goods, used as samples, was found at the store and place of business of the defendants in New-York, at which place Wills, one of the defendants, exhibited to a witness, and offered to sell him, the whole of the goods, and the samples, before they were exhibited to the witness, were brought in by Conley, another defendant, after an absence of only fifteen minutes from the time he was sent by Wills to get them, it was held, on the trial of an indictment found in the city of New-York, that the Court of General Sessions were right in overruling a motion to dismiss the case, or to direct the jury to acquit the prisoners, which motion was made on the ground that it was not shown that they had received or had the goods in question, within the city and county of New-York.

On the trial of an indictment for receiving stolen goods, knowing them to be stolen, it is not competent for the defendant, for the purpose of proving that when he received the goods he had no knowledge of their being stolen, to prove what the person from whom he received the goods said as to the manner in which such person became possessed of the property.

Where a witness on the part of the prosecution had been asked, on his cross-examination, if one of the defendants had not made a certain remark to him, or in his hearing, and at a certain time and place, and had testified

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that he had not, it is not competent for such defendant to prove, by another witness, that he, the defendant, did make such remark at the time and place in question. What such defendant had said was immaterial and incompetent, and could not be made competent, even for the purpose of impeachment, by the fact that the witness for the prosecution had denied it.

Where a witness, called by the defendants, testified that he saw in the store of the defendants samples of the property alleged to have been stolen, it is not competent for the defendants to prove by the witness what was said by one of the defendants then present "as to what the property was doing there."

Under the statute of this state, a person may be tried and convicted of the offence of feloniously receiving and having stolen goods, either in the county where the prisoner originally received the stolen property or in any county in which he afterwards had it.

THIS was a writ of error to the Court of General Sessions of the city and county of New-York. The defendants, with one Wilson, were indicted for feloniously receiving and having stolen property, with counts against some of them as accessories. The indictment was as follows :

City and County of New-York, ss :

The jurors of the people of the State of New-York, in and for the body of the city and county of New-York, upon their oath, present :

That Charles Wills, late of the first ward of the city of New-York, in the county of New-York, aforesaid, William Conley, late of the same place, and James R. Wilson, late of the same place, on the fifth day of January, in the year of our Lord one thousand eight hundred and fifty-six, with force and arms, at the ward, city and county aforesaid : fifty veils of the value of five dollars each, fifty shirts of the value of five dollars each, fifty collars of the value of five dollars each, fifty pieces of edging of the value of five dollars each, fifty pieces of inserting of the value of five dollars each, fifty robes of the value of five dollars each, and fifty waists of the value of five dollars each, of the goods and chattels of Aaron G. Crane, by some person to the jurors aforesaid unknown, then lately before feloniously

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stolen of the said Aaron G. Crane, unlawfully, unjustly and for the sake of wicked gain, did feloniously receive and have; the said Charles Wills, William Conley and James R. Wilson then and there well knowing the said goods and chattels to have been feloniously stolen, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That afterwards, to wit, on the day and in the year last aforesaid, the said Charles Wills, late of the ward, city and county aforesaid, with force and arms at the ward, city and county aforesaid, fifty veils of the value of five dollars each, fifty shirts of the value of five dollars each, fifty collars of the value of five dollars each, fifty pieces of edging of the value of five dollars each, fifty pieces of inserting of the value of five dollars each, fifty robes of the value of five dollars each, fifty waists of the value of five dollars each, of the goods and chattels of one Aaron G. Crane, by some person to the jurors aforesaid unknown, then lately before feloniously stolen of the said Aaron G. Crane, unlawfully, unjustly and for the sake of wicked gain, did feloniously and willfully receive and have; the said Charles Wills then and there well knowing the said goods and chattels to have been feloniously stolen.

And the jurors aforesaid, upon their oath aforesaid, do further present: That William Conley and James R. Wilson, each late of the ward, city and county aforesaid, at the ward, city and county aforesaid, before the said felony and receiving stolen goods so as committed in form aforesaid, on the fifth day of January, in the year last aforesaid, did feloniously, willfully and maliciously incite, move, procure, aid, counsel, hire and command the said Charles Wills the said felony and receiving stolen goods, in manner and form aforesaid, to do and commit, against the form of the statute in such case made and provided, and against the

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peace of the people of the State of New-York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That afterwards, to wit, on the day and in the year last aforesaid, the said William Conley, late of the ward, city and county aforesaid, with force and arms, at the ward, city and county aforesaid, fifty veils of the value of five dollars each, fifty shirts of the value of five dollars each, fifty collars of the value of five dollars each, fifty pieces of edging of the value of five dollars each, fifty pieces of inserting of the value of five dollars each, fifty robes of the value of five dollars each, fifty waists of the value of five dollars each, of the goods and chattels of one Aaron G. Crane, by some person to the jurors aforesaid unknown, then lately before feloniously stolen of the said Aaron G. Crane, unlawfully, unjustly and for the sake of wicked gain, did feloniously and willfully receive and have; the said William Conley, then and there well knowing the said goods and chattels to have been feloniously stolen.

And the jurors aforesaid, upon their oath aforesaid, do further present: That Charles Wills and James R. Wilson, each late of the ward, city and county aforesaid, before the said felony and receiving stolen goods was committed in form aforesaid, to wit, on the fifth day of January, in the year aforesaid, at the ward, city and county aforesaid, did feloniously, willfully and maliciously incite, move, procure, aid, counsel, hire and command the said James R. Wilson the said felony and receiving stolen goods, in manner and form aforesaid, to do and commit, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That afterwards, to wit, on the day and in the year last aforesaid, the said James R. Wilson, late of the ward, city and county aforesaid, with force and arms,

at the ward, city and county aforesaid, fifty veils of the value of five dollars each, fifty shirts of the value of five dollars each, fifty collars of the value of five dollars each, fifty pieces of edging of the value of five dollars each, fifty pieces of inserting of the value of five dollars each, fifty robes of the value of five dollars each, fifty waists of the value of five dollars each, of the goods and chattels of Aaron G. Crane, by some person to the jurors unknown, then lately before feloniously stolen of the said Aaron G. Crane, unlawfully, unjustly and for the sake of wicked gain, did feloniously and willfully receive and have; the said James R. Wilson then and there well knowing the said goods and chattels to have been feloniously stolen.

And the jurors aforesaid, upon their oath aforesaid, do further present: That Charles Wills and William Conley, each late of the ward, city and county aforesaid, before the said felony and receiving stolen goods was committed in form aforesaid, to wit, on the fifth day of January, in the year last aforesaid, at the ward, city and county aforesaid, did feloniously, willfully and maliciously incite, move, procure, aid, counsel, hire and command the said James R. Wilson the said felony and receiving stolen goods, in manner and form aforesaid, to do and commit, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

A. OAKLEY HALL,
District Attorney.

The defendants, Wills and Conley, having been arrested, pleaded not guilty, and the cause came on to be tried, as against them, on the 8th December, 1856, before Elisha S. Capron, City Judge.

Aaron G. Crane was called and sworn as a witness for the prosecution, and testified as follows: I am of the firm of Crane & Struthers; we are importers of lace goods and

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embroideries ; we do business at No. 177 Broadway ; on the morning of January fifth a burglary was committed at our store ; I found that our whole premises, consisting of three lofts, were all in disorder, and a large amount of goods stolen ; they consisted of jaconet collars, infants' robes, infants' waists, embroidered habit shirts, needlework trimmings, black lace veils, blonde lace edgings, also some colored goods, and the whole valued at from \$6000 to \$7000 ; another firm occupy part of the premises ; sometimes their porter gets to the store before ours, and in that case he opens the door ; I cannot say which porter opened the door that morning ; we recovered part of the stolen property, and have about \$2500 worth of it now in our possession ; we recovered a portion of all the goods stolen ; it was on January eighteenth that I saw those goods in two black trunks and a black bag ; I immediately recognized them by our private mark ; I saw them at Mr. Samuel Emberson's house, in Eighth-avenue ; he was present when I saw them.

Cross-examined. The private marks were on the goods when I saw them at Emberson's ; the name of the firm did not occur on the tickets ; I have not the letter or a copy of the letter which I wrote to Mr. Emberson ; I remember the contents of it.

Samuel Emberson was next called and sworn as a witness for the prosecution, and testified as follows, viz. : I do business at No. 285 Eighth-avenue ; I am a dealer in lace goods and embroideries ; I know Wills and Conley ; they did business last January at No. 333 Broadway, corner of Worth-street ; they occupied three rooms ; two rooms on a line, as you enter, and one at the back of the office ; I was in their office on January tenth, in the afternoon ; I saw Wills and Conley there ; Wills beckoned me to come into the private office ; I went in and he locked the door ; he asked me if I would buy goods that were "pulled" or "drawn ;" I asked him what he meant by "pulled" or "drawn ;" he said he would be plain with me, he meant goods that were stolen ;

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I said I was surprised at him, and asked him if he thought I would buy stolen goods; then I asked him what kind of goods they were; he pulled a memorandum from his vest pocket and told me what they were; he read a description of the goods: blonde laces, infants' robes, infants' waists, black lace veils, and brown and blue goods; he asked me if I saw the *Herald* of Sunday; I told him no; he told me to go home and read the *Herald* of Sunday; I saw an advertisement there relating to stolen goods; I saw Wills and Conley the next morning; I would now know a man called Wilson, but I did not know him then; I first saw him at the Tombs; I saw Wills and Conley, the morning after I had seen the *Herald*, at their office; Wills asked me if I had seen the *Herald*; I said I had; I asked him for a sample of those goods; he asked me if I would buy them; I told him there would be no harm in looking at a sample; he asked me if I had any business down town; I told him yes; he said if I would come in at twelve o'clock he would show me samples of the goods; I told him I was going to auction; I returned to Wills a little after eleven o'clock; I saw Wills and Conley; I asked again to see samples of the goods; he sent Conley after them; he told Conley to be careful that any one was not watching; he was gone about fifteen minutes; he then came in with samples buttoned up inside of his coat; he went into a private room and left them there; Wills and I went in and examined them; he locked the door; they consisted of veils, chemisettes, waists and blonde laces; they had no marks on them; he wanted me to give an offer for them; I told him I did not like to buy goods in that way; I insisted on seeing the whole lot of goods; he said there was \$6000 or \$7000 worth of them; he said he would not let God Almighty see them; he said if I bought them I would make money from them, for I could buy the whole lot for from \$2000 to \$3000; I persisted in seeing the whole lot of goods, for I would not buy a pig in a sack; he then said he would let me see them the next day, and I made the appoint-

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ment to meet him : I saw Wills the next morning, at the office ; I do not remember if Conley was there ; he could not let me see the goods, but appointed Monday following for the day when I could see them, as he had not yet made his arrangements, I appointed to meet him on Monday, and I went to him ; he made an appointment with me at noon on that day to go and see the goods ; he said there was a warrant out for him and Conley, but it was not of much importance, and would be settled in an hour ; he said he was going to get bail ; I returned at noon, but found they were locked up in the Tombs ; I saw them the next day at the Tombs ; I asked them if I could do anything for them ; I asked Wills if he could let me see those goods ; he said he would be out on bail that day, and he would show them to me ; I left them then, and saw them next morning in the Tombs again ; there was one person in to see them when I first went there ; when he came out I went in ; I told Wills to give me an order to see the goods ; he told me I ought not to allude to the affair, even to my wife ; he asked me why I had spoken to any one outside about it ; he alluded to Wilson ; I replied that if Wilson did not know anything, he could not tell anything about it from what I said ; I insisted on getting the order from Mr. Wills ; he gave me an order to see them ; this paper now shown to me is the order ; it reads, " This is the person ; " signed, " Charles Wills ; " I showed the order to Wilson ; it was not directed to anybody ; I came out of the prison when I got the order ; I had a conversation with Wilson outside the prison ; I saw Wilson again that morning ; I understand Wilson keeps the " Shades, " in Greene-street ; I went to Leonard-street with Wilson, afterwards to the Court of Sessions, and afterwards to the Williamsburgh ferry ; I went alone and saw Wills going on board the boat and beckoning me to come on ; we went to Williamsburgh ; he shook his head to prevent my speaking to him ; I saw Wills talk to another man on the boat ; I asked him afterwards who the man was and he said

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he was a horse doctor; I went to Lee-avenue, near Ross-street; I there saw a woman in the basement; Wills asked her for a light; we proceeded up stairs, and he took me into the parlor; he opened a door at the head of the stairs and brought out two trunks and a black bag; I helped to haul the trunks into the parlor: they were locked, and he told me that Wilson would be there with the keys in a few minutes; I waited for him; in about ten or fifteen minutes Wilson came; I first saw Wilson when I was waiting to go into the Tombs to see Wills and Conley; I asked Wilson then if he was a friend of Wills and Conley; he said he was, and asked me if I was; I replied that I knew Wills and was anxious to get them both out of the Tombs, as I was buying a large lot of goods of them; he said I might not be alarmed, as the goods were all right; he said if I could get an order from Wills that I was the right person he could sell them to me as well as they could; he said he had the keys of them in his pocket; he then went in to see the prisoners; when he came out he told me to go in and get the order from Wills, and he would wait; I went in and had the conversation with Wills that I testified to above; I showed Wilson the order Wills gave me, and he made an appointment to meet me; I afterwards saw him in Leonard-street and accompanied him to the Court of Sessions, when he appointed to go with me and see the goods; he told me to go to the Peck-slip ferry; when I went there I saw Wills as I stated, and went with him to the house; when Wilson came he unlocked the trunks, and said if I would buy the goods he would bring them to the ferry, but would not take them across; Wills took a piece of paper and made a memorandum of the goods while I counted them over; Wilson laid on the floor and watched me to see if I counted straight; I never saw the memorandum since; I had a memorandum of the goods which had been stolen from Mr. Crane.

Question. From whom did you receive the memorandum?

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This was objected to by the prisoners' counsel, as incompetent and irrelevant, but allowed by the court; and to the decision of the court in that behalf the prisoners' counsel excepted.

Answer. I procured the memorandum from Mr. Crane.

Question. When did you procure it from Mr. Crane.

(Like objection, decision and exception as last above.)

Answer. I got it one or two days before I went to Williamsburgh; I procured the memorandum from Mr. Crane; I saw that all the missing goods were not there; they told me they were not all there, but that I could have them all; I made up my mind to buy that portion of the goods; I either got a copy of the memorandum Wills made, or took one; I asked him what he wanted for the goods; Wilson said they were worth \$5000; I said they were not, as I knew as much about their value as he did; he said he had been in the store where they came from, and priced them; he said he had also asked the value of such goods in the stores in Broadway, and found they were very expensive; we then left, Wills, Wilson and myself; they said if I would buy that portion of the goods, they would give me the rest the same night; on coming down to the ferry, Wilson asked us to go into a place and drink; we did so, and then went over the ferry to Grand-street; all the time I was bargaining for the goods; we separated at the "Shades," in Crosby-street, kept by a man named Stuart; I made an appointment with Wills to go the next day and see the rest of the goods; I saw Wills next day at Peck-slip ferry; we crossed over to Williamsburgh; I went to a livery stable and got a hack to convey the goods from the house in Lee-avenue; I paid \$2000 to Wills, \$1800 in bills and the rest by a check; I conveyed the goods to my premises in Eighth-avenue; Wills left the carriage in Second-avenue; I marked the bills I. and T.; they were \$100 bills; Wills said he would have nothing to do with checks in such a transaction; I told him the bank was not open, and the \$1800 were all the broker had

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from whom I got the money ; I succeeded in getting him to take the \$200 check ; the check now shown me is the one he took ; that is Wills' indorsement.

The check is as follows :

"No. . NEW-YORK, January 18, 1856.

New-York County Bank, corner of 14th-st. and 8th-avenue: Pay to C. Wills or order two hundred dollars.

"\$200.

SAMUEL EMBERSON."

(Indorsed) "C. WILLS."

Question. Where did you get the \$2000 ?

This was objected to by the prisoners' counsel, as incompetent and irrelevant, but allowed by the court ; and to the decision of the court in that behalf the prisoners' counsel excepted.

Answer. I got the \$2000 from Mr. Crane ; that is to say, Mr. Crane gave me a check for \$2000, and I used that money to buy the goods ; Mr. Crane came to my house to see the goods ; I subsequently sent them to Mr. Crane ; I saw Wills the evening I bought the goods ; the balance of the goods were to be delivered that night at my store ; I waited for them ; Wills came and said that the party who owned the other goods was in the country, and he could not get them that night ; the next day he said the party had not returned, but he would try and get the goods for me ; I saw him often afterwards ; I did not see Wilson afterwards.

This witness was cross-examined at length, but no question arose for decision on the cross-examination.

After Ann Crosby had been examined by the prosecution, Samuel Emberson was recalled for the prosecution and further examined.

On his further cross-examination, he reaffirmed in substance all that he had sworn to on his first direct examination ; he stated the additional fact that when Wills sent Conley for the samples, as he had testified, he told him to be careful

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if Pincus was watching him ; he admitted that he had borrowed money of Mr. Crane, and had repaid it with interest ; also, that he had purchased goods of Mr. Crane, and had paid for them ; also, that he owed Mr. Crane for goods at the present time, but that the time for payment had not arrived.

He testified further as follows : I don't know Mr. Maeder ; I remember meeting Wills in April last, and telling him the case was coming on ; I remember meeting Wills on the Eighth-avenue, and telling him the trial was coming on ; it was about ten o'clock at night ; it was just after I closed my store for the night ; Wills was frequently lounging round my store, and always wanted to talk with me ; there was a person with him on this occasion ; I don't remember taking Wills aside and talking with him ; I don't remember particularly anything I said ; Wills did not say to me, as he turned around from me, after holding any conversation with me, "I would not give three cents to settle the matter ; I wish to have the case fully investigated," or anything to that purport or effect.

After several other witnesses had been examined by the district attorney, the evidence on the part of the prosecution was closed.

The counsel for the prisoners then moved the court to order that the defendant, William Conley, be discharged from the indictment, it appearing that there was not sufficient evidence to put that defendant on his defence ; that the evidence of Samuel Emberson, which was all there was against that defendant, did not make out a case against him.

The court overruled the motion, and refused to order the discharge of the last named defendant from the indictment ; and to its decision and refusal in that behalf the counsel for the last mentioned defendant excepted.

The counsel for the prisoners then moved the court to dismiss the case, or to direct the jury to acquit the prisoners, because of a want of jurisdiction on the part of the court ;

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it not appearing that the prisoners, or either of them, feloniously or otherwise, bought or received, in any manner upon any consideration, the property of Mr. Crane, or Crane & Struthers, or any part of such property, within the city and county of New-York.

The court overruled the motion, and to its decision the counsel for the prisoners excepted.

The counsel for the prisoners then opened the case to the jury.

After other testimony, *Augustus H. Maeder* was called as a witness for the prisoners (Wills and Conley), and being duly sworn, testified as follows, viz. : I am a dentist ; I carry on business at No. 333 Broadway ; the next room to Wills' office ; I have been in business there four years ; I know Wills and Conley ; I have known them since they occupied the office next to me ; I was in Wills' office in January last ; in the second week of January, before or about the middle of the week ; I was in his office weighing gold ; I was using their scales ; it was in the morning ; while I was there, a gentleman came in with some samples of goods ; the goods consisted of bosoms, collars and dark veils ; there were embroidered collars ; the laces were embroidered ; there were some baby waists ; the veils were black ; the man who brought them in said he wanted to raise two thousand dollars on them ; Wills requested him to leave the samples, and call in the afternoon ; the goods were brought in a box, in brown paper ; I cannot tell how large a box ; about twelve or eighteen inches long, and shallow ; not deep ; I think all the samples were in one box ; he produced a list, and told Wills how many he had.

Question. Did he say anything as to the manner in which he became possessed of the property ; and if so, what did he say ?

Question objected to by the district attorney, and excluded by the court ; and to the decision of the court in that behalf, the counsel for the prisoners excepted.

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Question. Did he say anything as to what the portion of the property not exhibited consisted of; and if so, what did he say?

Like objection, decision and exception.

Question. Can you remember any other conversation between the man and Wills at this time, than you have already stated?

Like objection, decision and exception.

Question. Were you in the office at the time Wills and the man were there together?

Like objection, decision and exception.

The witness proceeded: I saw Samuel Emberson and Wills together on the Eighth-avenue; it was pleasant weather, in the evening, between nine and ten o'clock; it was between Twentieth and Thirtieth streets; I was with Wills, and another friend of his was along; Emberson met us in the Eighth-avenue; I think he was walking in the same direction with us, and overtook us; he called Wills aside, and they conversed together; I did not hear the conversation between them.

Question. Did you hear what was said between them, or any part of it, as Wills turned round to leave Emberson? and if so, state what you heard.

This question was objected to, by the district attorney, as incompetent, and excluded by the court; and to the decision of the court in that behalf the counsel for the prisoners excepted.

The district attorney then asked the counsel for the prisoners what they proposed proving by the last question? The counsel for the prisoners replied, that they proposed showing, by way of contradicting Samuel Emberson, that in this conversation Wills made use of this language to Emberson: "I would not give three cents to settle the matter; I wish to have the case fully investigated;" or to that purport.

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The district attorney objected to proof of the last mentioned facts, as stated by the counsel for the prisoners, and the court excluded the proposed proof, and refused to allow it; and to the decision of the court in that behalf the counsel for the prisoners excepted.

John Pincus was next called as a witness for the prisoners (Wills and Conley), and being duly sworn, testified as follows: I am a commission merchant, at 88 Cedar-street, in this city; I have been in business for five years; I have known Wills and Conley for about two years; I have been in their place of business; I was there in January last; it was on the tenth or eleventh of January, between nine and ten o'clock in the morning; I saw a bundle of samples lying on the top of the iron safe; the safe stood opposite me as I entered; Wills showed them to me, on the counter; they were in a box, in a brown paper; there were collars, veils, ladies' chemises, laces and other goods; I passed no value upon them.

Question. Was anything said by Wills as to what the property was doing there?

This question was objected to by the district attorney, and excluded by the court; and to the decision of the court in that behalf the counsel for the prisoners excepted.

After the examination of several other witnesses on the part of the prisoners, Wills and Conley,

John Sedgwick was called as a witness in their behalf, and testified as follows, viz.: I am assistant district attorney of this county; I drew the indictment in this case; I got the description of the property set out in the indictment from Mr. Crane; I cannot specify any source from which I obtained it; I think prior to the making of the affidavit on which the prisoners were arrested, I had a list of the articles stolen from Mr. Crane, given me by himself; I think the description of the property in the indictment was taken from that list.

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The prisoners' counsel offered to show, as a circumstance discrediting Samuel Emberson, that for four terms or more preceding their trial, the prisoners had been ready, and had moved the court to bring on the trial of the indictment, and that the delay was owing to the prosecution; and that at the last term of the court, the recorder stated that he considered it a hard case, and that if it came before him again on a similar application, or under similar circumstances, he would feel bound to interfere for their relief.

The district attorney objected to the offered proof of the facts last mentioned, and the court refused to allow any proof thereof; and to the decision of the court in that behalf the counsel for the prisoners excepted.

After the evidence closed, the counsel for the prisoners renewed the motion to the court, heretofore made on behalf of the defendant William Conley, namely, for an order that he be discharged from the indictment, on the grounds herein already stated, and upon the additional ground that the case for the prosecution having closed, and the testimony disclosing nothing further against that defendant, the court could pass upon the motion with the whole case before it.

This motion was renewed, on behalf of each of the prisoners, separately and distinctly, and was overruled by the court in relation to both and each of them; and to the decision of the court in that behalf the counsel for the prisoners excepted, on behalf of both and each of the prisoners.

The case having been summed up to the jury, the counsel for the prisoners requested the court to instruct the jury upon the following propositions, viz. :

1. If the jury believe that the defendants first bought or in any way received the last mentioned property (i. e., the property described in the indictment), in Williamsburgh, Kings county, and that after that they brought into and exposed for sale, in the county of New-York, the last mentioned pro-

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perty, or any part of it, they cannot be convicted under the present indictment.

2. That the testimony of Samuel Emberson as to Wills sending Conley out for the patterns or specimens, and what then passed, is not sufficient, of itself or by itself, to justify the conviction of Conley.

The court refused so to charge, and to such refusal the counsel for the prisoners excepted.

The jury found both the defendants guilty, and they were sentenced to imprisonment in the state prison for four years and eight months. A writ of error was then sued out in their behalf.

John Graham, for the prisoners.

I. The question to the witness Emberson, as to the person from whom he received the memorandum of the goods stolen from Crane & Struthers, was improperly allowed by the court to be put by the prosecuting counsel. This was a memorandum which Emberson alleged he had with him when examining certain property, which he swore Wills showed him at Williamsburgh. The evidence related to a transaction in the absence of the accused. With reference to them it was *res inter alios acta*. Besides, it was allowing the witness to support his testimony in a way in which the guiltiest person could always make evidence in his favor. All that a guilty person has to do do, within this ruling, to screen himself from suspicion, when his interference with the property of another is criminal, is to treat with the owner, and profess to act under and for him, and the end is gained. If called as a witness to fasten guilt upon another who may be innocent, this fact is to corroborate his evidence and place it above all question. In other words, a witness may show that he is not *particeps criminis* by evidence which is not available to the party accused, and thus manufacture

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himself his own corroboration. The position of the witness will be fully appreciated, when it is considered that he was not only making out a case against the accused, but, in so doing, was destroying what, without his explanations, was a conclusive case against himself. The evidence was certainly not *german* to the issue. That was as to the guilt or innocence of the accused. The witness had not been assailed at this time by any evidence calculated to impeach the motive of his conduct. The necessity of supporting him was felt, and was anticipated; which was beyond all rules or reason.

II. The principle of the last point is applicable to the other exceptions where questions were allowed by the court, still further exhibiting the connection of the witness with Mr. Crane, one of the prosecutors.

III. The court below erred in refusing to order that William Conley, one of the plaintiffs in error, be discharged from the indictment at the close of the case for the prosecution, in the first instance. All the evidence against Conley was given by Emberson. The motion was made in pursuance of 2 R. S. (735, § 21.) It will be observed that the statute does not refer merely to a case in which there is no evidence to put a party on his defence; but cases where, though there may be some, there is not sufficient evidence for that purpose. The order of discharge can be made by the court without the interference of the jury. If Conley was entitled to his discharge the error in not ordering it affected both him and Wills. He could have been a witness for the latter, and in that way have materially aided his defence. Believing all Emberson swore to, and supposing it to place Wills' guilt beyond all doubt, still it showed no participation on the part of Conley. On the contrary, Wills never permitted him to be present at a single interview between himself and Emberson. Where a combination or conspiracy is charged, evidence, which should have been allowed as to any conspirator, if disallowed, will form

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a good ground of exception as to all. (*Barthelemy v. The People*, 2 Hill, 248, 253, 259.)

IV. The court below erred in refusing to dismiss the case or to direct an acquittal. In the indictment it was alleged that the accused received and had. As receiving and having are, within the view of the prosecution, as will be hereafter seen, separate offences (2 R. S., 726, § 43), unless the copulative "and" makes "having" synonymous with "receiving," each count of the indictment would be bad for embracing two offences. The mode of connecting or associating the words show that the pleader meant to charge the receiving to be the offence. If the indictment had said "received or had," it might have been different, but still liable to the objection of two offences in one count. When the prosecution rested, there was no evidence to show that the identity of any property which Emberson swore he saw at the loan office was that of the prosecutors, beyond Wills' admission that it was a part of the stolen property, made in the absence of Conley. Certainly as to Conley this was not the least evidence; and as to Wills, as the identity of the property was a part of the *corpus delicti*, his simple admission would not prove it as to him. (*The People v. Hennessy*, 15 Wend., 147; *The People v. Badgley*, 16 id., 53.) If the having the property is made an offence, it does not warrant the presumption that the receiving took place where the parties had the property. If this is not so, why should the statute use the words, "received or had?" (2 R. S., 726, § 43.)

V. The court below erred in excluding the questions to the witness Maeder. (*Mezzara's case*, 2 City Hall Recorder, 113; *Atwood's case*, 4 id., 91; *Robetaille's cases*, 5 id., 171, 173; *United States v. Craig*, 4 Wash. C. C. R., 729; *Mitchum v. The State*, 11 Geo. R., 615; *Rex v. Whitehead*, 1 Carr. & Payne, 67; *Rex v. Crutchley*, 5 id., 133; *Powell v. Harper*, 5 id., 590; *Hayslep v. Gymer*, 1 Adolph. & El., 162.)

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VI. The court below erred in excluding the question to the witness Maeder, as to whether the defendant Wills made the remark to Samuel Emberson, at the close of the conversation with him, as there inquired after. The court manifestly deemed the evidence proposed incompetent, and refused to allow proof of the fact, from this or any other witness. The attention of Emberson had been properly called to the matter; and the decision of the court can only be sustained upon the ground that the attempt was to contradict as to purely collateral matter. (*Lawrence v. Barker*, 5 *Wend.*, 301; 2 *Phil. Ev.*, 726, *Cov. & Hill's ed.*, 1843; *The People v. Austin*, 1 *Park. Cr. R.*, 157.) For correct instances of collateral matter, see *Lawrence v. Barker* (5 *Wend.*, 301), *Harris v. Wilson* (7 *id.*, 57). In determining whether the question excluded affected collateral matter only, the court is to decide upon the legal effect of what Emberson had sworn to. In saying that Wills was loitering around his place of business, trying to speak with him, and in denying that Wills made use of the language suggested, did he not virtually swear that Wills all along admitted his guilt? Was not this the impression he must have conveyed to the jury? Was it not vital to the defence to show that, on this occasion, Wills indulged in a manner and language directly inconsistent with what Emberson had sworn he indulged in, when he placed Wills alone with himself in his (W.'s) office, and other places, when and where he could make him speak and act as his (E.'s) feelings might induce him to swear he did? This is as strong a case as *Patchin v. Astor Mutual Insurance Company* (3 *Kern.*, 268). Had the question excluded been put and answered, it would not only have impeached the feature of Emberson's testimony specifically aimed at, but it would have affected, more or less, his entire evidence in chief. Another view, establishing the error of the court below, is, that Emberson's evidence in this particular, if false, must have been conceived and manufactured in a spirit of hostility — unfriendliness. The rule on this point is, that

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whatever tends to prove the unfriendly feelings of the witness towards the party against whom he is testifying, is competent. (*Starks v. The People*, 5 Denio, 108; *Newton v. Harris*, 2 Seld., 345.) Another view is this: If the testimony of Emberson, in the particular adverted to, is false, it would be material within the rule regulating indictments for perjury. "Every question on cross-examination which goes to the credit of the witness is material. (*Reg. v. Overton*, 1 Carr. & Marsh, 655.)

VII. The court below erred in excluding the question to the witness Pincus. The object of this evidence was to show that Wills was endeavoring to sell the property in pursuance of instructions, and that he gave an account of the manner in which he became possessed of it, tallying with what Maeder had partially sworn to, and would have fully sworn to if allowed by the court. It disproved secrecy—concealment on the part of Wills—and established a mere business connection with the property.

VIII. The offer to show that the plaintiffs in error had endeavored to force on their trial was improperly overruled.

IX. The court below improperly overruled the motion for the discharge of Conley, at the close of the evidence on both sides.

X. The court below erred in refusing to charge that if the property embraced in the indictment, or any part of it, was received feloniously in another county, and subsequently brought into this county by the defendants, no conviction could take place under the indictment; and in charging that, under such circumstances, a conviction could take place. This request went to the jurisdiction of the court. 2 *Revised Statutes* (p. 697, § 1) defines the jurisdiction of the several courts of this state over crimes. For the more efficacious distribution of government, the principal civil division of the state is into counties. (1 *id.*, 83, § 1.) The judicial arrangements of these counties, as are the other branches of their economy, are carefully prescribed by

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statute, and it is through them the criminal laws of the state are applied and enforced. It may be observed, as a general rule, that offences against public law, although the property of the people of the whole state, are nevertheless to be tried and punished by the courts of the counties within whose limits they occur or are committed; in other words, jurisdiction is local. This was so at common law. (1 *Trials per Pais*, 125.) Moreover, at common law, the jury came from the "neighborhood, or place near at hand, or neighbor place where the question (rose) about (which) the fact is (was) moved (*id.*, 115): that is, jurors were summoned from the place, where they may have the better and more certain knowledge of the fact." (*Id.*) *Visne* or *venue* was used in a twofold sense: First. In reference to the jurisdiction of the court; Second. In reference to the place from which the jury were to come. (2 *Bouv. L. Dic.*, "*Venue*," "*Visne*.") Our statutes proceed upon the principle of the locality of jurisdiction. The only difference is that, under the statutes, a county is a greater extent of territory than the *vicinetum* of the old law, and juries now are summoned *de corpore comitatus*. (*The People v. Hulse*, 3 *Hill*, 309; *Manley v. The People*, 3 *Seld.*, 296; *The People v. Allen*, 5 *Denio*, 76.) Courts of General Sessions are local courts, in the strictest sense of that term; and as they are of statutory creation, can exercise no powers not clearly conferred or given. Their jurisdiction is conferred at 2 *Revised Statutes* (p. 208, 209, § 5). By the first subdivision, they are "*to inquire of all crimes and misdemeanors committed or triable in such county*." Triable is used in contradistinction to committed, and means crimes which, although actually committed in one county, are constructively committed in every county through which the proceeds of the crime are carried. (2 *id.*, 727, § 50.) By the second subdivision, these courts are "*to hear, determine and punish*" all such crimes as do not produce death to the offender, or imprisonment in the state prison for life. The jurisdiction of the New-York General Sessions (the court

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below) has been since extended to crimes causing these consequences. (*Laws of 1855*, 613, § 1.) If having stolen property in one county, when it was actually received in another, is a distinct offence, the indictment should have alleged that offence specifically. It becomes a statutory offence, and should have been alleged, as all statutory offences are required to be, substantially in the terms of the statute. If the property in question was feloniously received in Kings county, and then brought into this county, the offence here was having it here, and for that the plaintiffs in error should have been indicted. That was the offence triable in the court below.

XI. The court below erred in refusing to charge the jury that a particular part of Emberson's evidence was not sufficient, of itself or by itself, to justify the conviction of Conley; and in charging the jury that it was sufficient.

XII. If the judgment is reversed as to either of the plaintiffs in error, it must be as to both. (2 *R. S.*, 736, § 21; *Grah. Pr.*, 960, 2d ed.) This seems to be the rule where the reversal takes place on bill of exceptions. (*Story v. The N. Y. and Harlem R. R. Co.*, 2 *Seld.*, 85.)

A. Oakley Hall (District Attorney), for the people.

I. The court properly admitted the two specific facts, that Emberson, the witness, received a memorandum of missing goods from the owner, and at a time prior to buying the goods of defendants, because these connected Emberson as the agent of the complainants, and were links to show that his dealings with defendants were not those of a guilty accomplice. A jury are entitled to know at the outset what agency, guilty or innocent, a witness has. (1 *Greenl. Ev.*, 382.)

II. The same may be said of the next exception. (6 *Metc.*, 221.)

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III. The only construction which can be given to the statute making it the duty of a judge to order a discharge from the record of one defendant against whom there is insufficient evidence is, that the matter is in the discretion of the court, to which no exception lies.

IV. There was jurisdiction in the county of New-York, the evidence of Emberson being that the transaction originated in New-York, where the goods first were seen. They were next in Williamsburgh, and again in New-York. Now, the offence is not the selling to the witness, but the receiving and having before. If, therefore, the jury believed that the goods seen primarily in New-York were stolen goods, the crime then and there attached, however afterward, in pursuance of a proposed sale, they were, on prisoners' security, moved about.

V. The point raised on Maeder's evidence is already *res adjudicata* in this court, in the case of *Rando*, and the law is for the prosecution. (*MS., dec. at Feb. Gen. Term.*)

VI. The court properly excluded the naked declarations of Wills in the course of a conversation about which the prosecution did not offer evidence. They were inadmissible in any aspect.

VII. The naked declarations of Wills were properly excluded, under law of *The People v. Wilcy* (3 *Hill*, 194). It was emphatically a declaration of innocence in advance of a charge.

VIII. The court properly refused to interfere with the province of the jury, and instruct it whether evidence was or was not sufficient.

By the Court, MITCHELL, J.—The plaintiffs in error were indicted and found guilty of feloniously receiving and having, in the city of New-York, certain goods knowing that they were stolen. Crane, the owner of the goods, proved that they were stolen, and that he found them afterwards at the house of S. Emberson, the principal witness in the cause.

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This alone might lead to the impression that Emberson was an accomplice in the stealing; it might be, however, that he had been employed by Crane to discover and obtain the property. It was proper, therefore, to prove how he became connected with the business, and Emberson was therefore properly allowed to testify that he had, when he went to Wills' office or store, a memorandum of the goods and that he had procured it from Mr. Crane one or two days before he went to Williamsburgh for the goods, and that when he bought the goods of the prisoners he paid them \$2000, which money he got in a check from Mr. Crane. Crane also testified that he had written a letter to Emberson. This evidence shows that Emberson, instead of being the accomplice of the prisoners, was the agent of the owner of the goods, aiding him to recover them. His testimony, for this reason, is admissible without corroboration.

A motion was made to the court to discharge Conley, on the assumption that there was no proof against him. It is too clear for dispute, that there was evidence to justify the jury in convicting Wills. Wills and Conley were in the same store, at the corner of Broadway and Worth-street, consisting of two rooms in a line, and a back or private office. Both were there on the tenth of January, when Emberson was there, and on the eleventh. The first day Wills took Emberson into the back office and asked him if he would buy stolen goods. It does not appear that Wills took Emberson to the back office on the second day, and it does appear that Emberson saw Conley as well as Wills at the store on that day, on two occasions; first, as he was going down town, and afterwards, on his return, at eleven, A. M., and it would seem that Conley was present at all the conversation on this day, when Wills asked Emberson if he would buy, and said he would show samples of them; the witness, speaking of his return to the store a little after eleven o'clock, says: "I saw Wills and Conley; I asked again to see samples of the goods; he" (Wills) "sent Conley after

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them ; he told Conley to be careful that any one was not watching ; he" (Conley) "was gone about fifteen minutes ; he then came in with samples buttoned up inside of his coat ; he" (Conley) "went into a private room, and left them there ; Wills and I went in and examined them ; he locked the door." Emberson, on cross-examination, said "that when Wills sent Conley for the samples, he told him to be careful if Pincus was watching him." The locking of the door, the direction to Conley to be careful that any one was not watching ; to be careful if Pincus was watching him, although acts of Wills, were done, the first in the presence of Conley, and the others in speaking to him, and showed to him that the transaction was one that needed concealment, and was probably criminal. His acting under such orders, and his concealing the samples by buttoning them inside of his coat, and taking them into the private office, were strong evidence that he knew the business of his employer, and that the goods were to be concealed, and that he was to be careful that he was not watched, because they had been stolen. Secrecy and concealment have always been evidences of consciousness of guilt. In addition to this, Conley, when searched, had on him this memorandum, which corresponded in general description with the stolen goods, although one of them contained some articles in addition ; and Pincus, in his testimony for the defence, speaks (as Emberson did in substance, for the prosecution) of the store as "their place of business," after saying he had known Wills and Conley for about two years. The motion to discharge Conley was properly denied.

A motion to dismiss the case, on the ground that it did not appear that either of the prisoners bought or received any of the property within the city of New York, was also properly overruled. The samples were received by Wills here from Conley, after Conley had been absent but fifteen minutes to get them ; that was evidence that he did not get them from Williamsburgh, but within the county of New

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York; and although the bulk of the articles was then in Williamsburgh, it was very probable that all were received here, and the bulk removed there for concealment, until the contrary should be proved. In this city was the prisoners' store, where they transacted their business in form, in loaning money on goods pledged. The house in Williamsburgh was only a place, apparently, for storing and concealing the goods.

On behalf of the prisoners, a witness was allowed to testify that he was at Wills' store about the middle of the second week in January, when a man came in with samples of goods, consisting of bosoms, embroidered collars, and dark or black veils and babies' waists, and said he wanted to raise two thousand dollars on them. The court refused to allow him to answer the question, "Did he say anything as to the manner in which he became possessed of the property; and if so, what did he say?" In the case of Rando, this court at the February term, by a majority vote, held that a very similar question could not be put. It may well be that where the question is whether, at the time when goods were received, the receiver knew that they were stolen, and the inquiry is merely as to his knowledge, and all that is then done in acts may be proved, that all that is then said, which could have influenced his opinion, may also be proved. But it is deemed most proper not to treat this as an open question here, and to leave it to a higher court to examine.

The prisoners offered to prove that, in a conversation between Wills and S. Emberson on the Eighth-avenue, Wills had said to Emberson that he, Wills, would not give three cents to settle the matter; that he wished to have the case fully investigated. This was offered, not as evidence admissible of itself, but to impeach and contradict Emberson. The declarations of Wills were not evidence of themselves in his behalf; Emberson's testimony, that Wills had not said so, was brought out by the prisoners themselves on

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cross-examination by them. A party cannot cross-examine a witness as to such matter, and then impeach by contradicting him. The original question was probably inadmissible; if admissible at all, it could be only as a mode of impeaching the witness by collateral matter; and in such case, the party bringing out the first answer must abide by it. If the question had been as to what Emberson had said, and the thing said was a contradiction of his previous testimony, the rule would be different: as if he had been asked if he had not said that Conley was not in the store when he went there, or that Wills had told him that he had loaned money on the goods, instead of saying, as Emberson testified in his direct examination, that they had been "pulled" or "drawn;" then another witness might be called to show that Conley had said so, not with a view to contradict the cross-examination, but to contradict his testimony on the direct examination, the cross-examination being necessary only to give the witness an opportunity to explain the inconsistency between his testimony under oath and his prior out-door remarks; and, except for this reason, any other person being competent to testify to the contradiction.

The question, "Was anything said by Wills as to what the property was doing at the store, 333 Broadway?" was properly excluded. It was not the proper mode of showing that he exposed the goods publicly, as is now suggested to have been the object of the question.

The judge was requested to charge the jury, that if they believed that the defendant first bought or in any way received the goods in Kings county, and afterwards brought them into New-York, and there exposed them for sale, they could not be convicted under this indictment.

The statute is, that the receiver of stolen goods "may be indicted, tried and convicted where he received or had such property, notwithstanding such theft was committed in another county." (2 R. S., 726, § 43.) The revisors' note

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to this section is: "*New*. In analogy to the rule which allows a prosecution for theft in any county where the stolen goods shall be carried. There is a similar English statute." (3 R. S., 844, 845, 2d ed.) The English statute is, that the receiver may be prosecuted "in any county or place in which he shall have, or shall have had, any such property in his possession" (2 Russ. on Cr., 238), not using the word "received" as our statute does. This shows that the natural meaning of our statute is its true meaning, and that it was intended to allow the trial in any county where the prisoner either received the property at first, or at any time afterwards had it. The words, "or had," are unmeaning without this interpretation.

The judgment should be affirmed.

Judgment affirmed.

SUPREME COURT. Albany Special Term, June, 1857. Before
Harris, Justice.

THE PEOPLE, *ex rel.* DANIELS, v. THE BOARD OF COMMISSIONERS OF EXCISE OF ALBANY COUNTY.

Under the "act to suppress intemperance and to regulate the sale of intoxicating liquors," passed April 16, 1857, the commissioners of excise have not power to sit more than ten days for the purpose of receiving and deciding upon applications for license.

THIS was a motion for a *mandamus*.

The relator, on the seventeenth of June, presented to the commissioners of excise his application for a tavern license in due form, and tendered the amount required to be paid for such license. The commissioners refused to receive the application, on the ground that the time for presenting applications had expired. The relator moved for a *mandamus* to

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compel the commissioners to receive the application and grant him a license.

W. G. Weed, for the relator.

R. W. Peckham, for the defendants.

By the Court, HARRIS, J.—I think it very clear that the power of the commissioners to receive applications and grant licenses is limited to ten days in each year. They are required to meet on the third Tuesday of May in each year, and on such other days as a majority of the commissioners shall appoint. If the provision had stopped here, it would have been competent for the commissioners to assemble and receive applications when and as often as they should see fit. Even then it would have been discretionary with them whether they would meet or not, and the court would have no power to control the exercise of their discretion.

But the legislature has expressly restricted the commissioners to ten days in each year. They are required to meet on the third Tuesday of May. The legislature evidently contemplated a single session, not extending beyond ten days from this specified time of meeting; for it is provided, by the fourth section of the act, that all licenses, when issued, if not revoked, shall continue in force until ten days after the next third Tuesday of May; but it is not made imperative that the commissioners, after having met on the third Tuesday of May, shall continue their session for ten days. They may adjourn to any other day they may appoint; or, having adjourned without fixing a day for re-assembling, a majority of them may subsequently appoint another day for meeting; but such sessions must not, in all, exceed ten days in any one year. The board for Albany county having already been in session ten days, have no further power to act as such board of excise during the present year.

The motion must therefore be denied.

Motion denied.

SUPREME COURT. At Chambers, Penn Yan, July 3, 1857. Before
Welles, Justice.

THE PEOPLE v. GEORGE WEBSTER.

Where a person, arrested and brought before a magistrate under the seventeenth section of the act entitled "An act to suppress intemperance and to regulate the sale of intoxicating liquors," passed April 16, 1857, refused to be sworn and examined as to the cause of his intoxication, the magistrate has no power to commit him to prison for such refusal.

It seems that justices of the peace, in examinations upon complaints made before them in criminal cases, have no power to commit persons for refusing to be sworn as witnesses.

THE defendant having been committed to the jail of the county of Yates, the writ of *habeas corpus* was allowed, directed to the sheriff of said county, who made return thereto, that the defendant was committed to jail and was held in prison by virtue of a warrant issued by J. J. Diefendorf, Esq., a justice of the peace of said county, which warrant is in the words and figures following :

Yates County, ss :

The People of the State of New-York, to the Sheriff, Under Sheriff, Deputy Sheriffs, any constable, and to the keeper of the common jail in said county, greeting :

Whereas, George Webster was duly apprehended this day by Martin Beam, a constable of said county, and brought before me, the undersigned, justice of the peace, charged on the oath of said Martin Beam, constable, with having this day been found drunk, or found and seen intoxicated, on Main-street, in the village of Dundee, in said county, in violation of section seventeen of an act to suppress intemperance and to regulate the sale of intoxicating liquors, passed April sixteenth, one thousand eight hundred and fifty-seven ; and the said George Webster having refused to be sworn, to be examined as to the cause of such intoxication : You are therefore hereby commanded to convey the said George

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Webster to the common jail of said county, and to deliver him to the keeper thereof; and you, the said keeper, are hereby required to keep said George Webster in safe custody in said jail until he shall consent to be sworn or affirm, and to answer all questions pertaining to such examination, or until he be discharged by due course of law.

Given under my hand, at Starkey, this eighteenth day of June, one thousand eight hundred and fifty-seven.

J. J. DIEFENDORF,

Justice of the Peace in and for Yates county.

Upon this writ a motion is made that the defendant be discharged from his said imprisonment. The matter was argued by

D. J. Sunderlin, for the defendant.

H. M. Stewart (District Attorney), for the people.

WELLES, J.—It is denied on the part of the defendant that the justice possessed the power to commit him to jail for the cause alleged in the warrant. That cause, as the warrant states, was that the defendant refused to be sworn as to the cause of his intoxication. The act under which the proceedings against the defendant were had (*Laws of 1857, ch. 628*) does not authorize the justice to commit the defendant for refusing to be sworn in such case. We are, therefore, to look elsewhere for such power, if any exists.

It is provided by the Revised Statutes that "any magistrate, authorized to exercise any jurisdiction in respect to offences, shall have the same power to preserve order during any judicial proceedings, and to punish for contempts, in the like cases and in the like manner as provided in the second chapter of the third part of the Revised Statutes in relation to justices of the peace in civil cases." (2 R. S., 748, § 44; *id.*, 931, § 51, 4th ed.)

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The provisions referred to as contained in chapter two, part three, are as follows :

" § 274. In the following cases, and in no others, a justice of the peace may punish, as for a criminal contempt, persons guilty of the following acts :

" 1. Disorderly, contemptuous or insolent behavior towards such justice, while engaged in the trial of a cause, or in the rendering of any judgment, or in any judicial proceedings, which shall tend to interrupt such proceedings, or to impair the respect due to his authority.

" 2. Any breach of the peace, noise or any other disturbance, tending to interrupt the official proceedings of a justice.

" 3. Resistance willfully offered by any person in the presence of a justice to the execution of any lawful order or process made or issued by him."

Sections two hundred and seventy-five, two hundred and seventy-six, two hundred and seventy-seven and two hundred and seventy-eight prescribe the punishment for such contempt and direct the manner of proceeding to enforce such punishment.

Section two hundred and seventy-nine is as follows :

" When a witness attending before any justice, in any cause, shall refuse to be sworn in any form prescribed by law, or to answer any pertinent or proper question, and the party at whose instance he attended shall make oath that the testimony of such witness is so far material that without it he cannot safely proceed in the trial of such cause, such justice may, by warrant, commit such witness to the jail of the county."

Section two hundred and eighty relates to the form of the warrant authorized by the last section, and directs that the witness shall be closely confined, pursuant to the warrant, until he submit to be sworn or to answer, as the case may be.

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Section two hundred and eighty-one directs that the justice shall thereupon adjourn the cause, at the request of the party in whose favor such witness attended, from time to time, until such witness shall testify in the cause, or be dead or insane. (2 R. S., 273, 274; *id.*, 458, 459, 4th ed.)

It is not contended that this case is within either the first or second subdivision of section two hundred and seventy-four. But it is suggested that the third subdivision of that section provides for the case under consideration. It is argued that the refusal to testify, recited in the warrant, was a willful resistance of a lawful order. But this, I apprehend, is a mistake. It was an omission to perform a duty, a disobedience of a requirement of the justice. It was not, in any proper sense, resistance. The subdivision relates to acts committed by any person by which the execution of an order or process of the justice is hindered, obstructed or prevented, and not to an omission to act or a refusal to obey. (*The People v. Benjamin*, 9 How. Pr. R., 419.)

Suppose a justice, in a case where a sufficient number of jurors fail to attend in obedience to a *venire*, makes an order that the constable summon a certain number of bystanders or others, as provided in section one hundred and one (2 R. S., 243), to supply the deficiency. If any person, in the presence of the justice, should do any act to hinder or obstruct the execution, by the constable, of this order of the justice, it would be a resistance of a lawful order, and a contempt provided for in the third subdivision in question. But if the constable should refuse to obey the order to summon the bystanders, or if a juryman regularly summoned and drawn on the panel should refuse to be sworn or affirmed as such, the refusal would not be, in my judgment, a contempt of court which the justice has power to punish, as for a contempt. The above cases are put to illustrate the distinction between positive and affirmative acts of resistance and mere passive disobedience. The former, and

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not the latter, are, as I think, intended to be provided for by the third subdivision of the above two hundred and seventy-fourth section.

The foregoing view is strengthened by an examination of article first of the second title of the next chapter of the Revised Statutes, entitled, "Provisions concerning Courts of Record, their powers and proceedings." The eighth section of that title contains an enumeration of acts for which persons guilty thereof may be punished by Courts of Record as for criminal contempts. The first and second subdivisions of the last mentioned section are in substance like the corresponding subdivisions of section two hundred and seventy-four, above recited, in relation to justices of the peace. The next three subdivisions are as follows:

"3. Willful disobedience of any process or order lawfully issued or made by it.

"4. Resistance willfully offered by any person to the lawful order or process of the court.

"5. The contumacious and unlawful refusal of any person to be sworn as a witness, and, when so sworn, the like refusal to answer any legal and proper interrogatory." (2 R. S., 278; *id.*, 467, 4th ed.)

It will be perceived that the legislature, in conferring power upon Courts of Record to punish for contempts, have, in the above third subdivision of section eight, declared willful disobedience of an order or process a contempt, and in the subdivision immediately following have also declared resistance to such order or process a like contempt; thus, as I think, expressly recognizing the distinction mentioned. The language of the fourth subdivision is quite as comprehensive as that of the third subdivision of the section in relation to Justices' Courts, and if the latter will bear the construction contended for, as contemplating acts of mere disobedience, no necessity is perceived for the introduction of the above third subdivision of the section in relation to Courts of Record. It cannot be supposed that the legislature regarded

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it necessary to be more specific in defining the powers of Courts of Record than of courts and officers of inferior and limited jurisdiction.

It remains only to consider whether the power in question is conferred by the above recited section (2 R. S., 274, 279) in relation to the case of witnesses refusing to be sworn or to testify on trials before justices of the peace. It will be seen that the power to commit the witness, as provided in that section, is conditional, dependent upon the fact that the party at whose instance the witness attends shall make oath that the testimony of the witness is so far material that without it he cannot safely proceed in the trial of the cause. The power of the justice to commit does not therefore vest until the party makes such oath. The section is entirely inapplicable to a case like the present. Here is no party to make the oath, and the warrant does not show that any such oath was made.

It is not a case in which such oath is at all contemplated, which, in the case provided for in the last mentioned section, is to give the justice authority to commit. There is no trial of a cause. The occasion for bringing the defendant before the justice was his being found intoxicated in a public place, &c., and it was not upon his trial for that offence that he was sought to be made a witness. It was a special proceeding, directed by the act of the last session of the legislature, in which it became the duty of the justice to administer to the defendant an oath or affirmation, not to prove the offence with which the defendant was charged, for that would be in violation of the sixth section of article first of the constitution, which declares that no person shall be compelled, in any criminal case, to be a witness against himself, but for the purpose of ascertaining the names of other persons implicated, against whom no complaint had as yet been made. It was a case in every respect dissimilar to the one contemplated by the last mentioned section, and to which it will be found impossible to apply it. The prohibi-

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tory act of 1855 contained a similar provision in relation to a person found intoxicated, and required the magistrate before whom such person should be brought to administer an oath to him similar to that required in the seventeenth section of the law of the last session, under which the warrant in this case was issued, and provided further, that if any witness should refuse to be sworn or affirmed, or to answer any question pertinent to such examination or trial, other than such as would criminate himself, he should be committed to jail, there to remain until he should consent to be sworn or affirmed, and to answer all questions, &c. (*Laws of 1855, ch. 231, pp. 350, 351, § 12.*) Why a similar provision to commit a contumacious witness was not introduced into the temperance act of the last session of the legislature I am not able to conjecture. It is either a *casus omissus* in the latter statute or it was omitted by design; on either hypothesis the omission tends strongly to show the necessity of the provision to justify the exercise of the power.

If it shall be said that the view herein contained, in relation to the powers of justices of the peace to commit in criminal proceedings, will, if sustained, deprive them of important and necessary facilities for the eliciting of facts and advancing criminal justice in the detection of crimes, I can only say, I cannot help it. It is not for courts or judges to make laws; and if those upon whom that duty devolves deem an enlargement of the powers of justices in such cases necessary or wise, they have but to will it and it is done.

There were several other objections urged against the legality of the defendant's imprisonment, which I do not feel called upon to consider, for the reason that the foregoing views dispose of the case and require the discharge of the defendant.

Defendant discharged.

SUPREME COURT. Saratoga General Term, June, 1857. *C. L. Allen, James and Rosekrans, Justices.*

THE PEOPLE *v.* PATRICK MCKINNEY.

Where a person testifies to what is true in fact, but at the time he testifies does not know it to be true, and has no knowledge on the subject, if such testimony be material and the act willfully committed, such person is guilty of perjury and may be convicted under an indictment in the ordinary form.

Where, in an action on an alleged contract, in which the making of the contract was in issue, a witness testified that he went with the parties to the field where the contract was made, and was present at the making of the contract, and heard it agreed to by the parties, and that no other persons were present except himself and the parties to the contract, and it appeared on the trial of an indictment against such witness, for perjury in giving such evidence, that such witness did not go to the field where the contract was made, and was not present and had no knowledge of the transaction, it was held that such evidence was circumstantially material, and that the witness, having testified willfully, was guilty of perjury.

Form of an indictment for perjury, committed in a civil action tried before a justice of the peace.

THIS was a *certiorari* to the Court of Sessions of the county of Saratoga, in which court the prisoner had been convicted of perjury. The indictment charged :

"That heretofore, to wit, on the twentieth day of August, in the year one thousand eight hundred and fifty-six, at the town of Waterford, in the county of Saratoga aforesaid, before John Cramer, 2d., Esquire, then and there being a justice of the peace in the said town of Waterford, &c., and being then and there duly authorized to execute the duties of the said office, a certain issue which had been theretofore joined between one Patrick Larkin, plaintiff, and one Platt R. Doughty, defendant, before the said John Cramer, 2d, as such justice of the peace, in a certain action on contract, came on to be tried; which said action had before that time been commenced between the parties in that behalf, and was then and there pending before the said John Cramer, 2d, as such justice of the peace, and which said issue was

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then and there tried in due form of law, on the said twentieth day of August, one thousand eight hundred and fifty-six, before the said justice in the said town of Waterford.

“And the jurors aforesaid, on their oath aforesaid, do further present: That, upon the said trial of the said issue, Patrick McKinney, late of the town of Waterford, in the said county of Saratoga, did then and there appear, to wit, at the said town of Waterford, on the said twentieth day of August, one thousand eight hundred and fifty-six, and was produced as a witness for and on behalf of the said Patrick Larkin, the said plaintiff, and was then and there sworn in due form of law, and did then and there take his corporal oath, before the said John Cramer, 2d, then and there being such justice of the peace as aforesaid (and duly authorized to exercise the duties of said office as aforesaid), that the evidence which he, the said Patrick McKinney, should give, on the trial of the said issue between the said Patrick Larkin, plaintiff, and the said Platt R. Doughty, defendant, should be the truth, the whole truth, and nothing but the truth, which oath was then and there duly administered to the said Patrick McKinney by the said John Cramer, 2d, as such justice, the said John Cramer, 2d, as such justice, then and there having jurisdiction over the subject matter of the said issue, and the persons of the parties thereto, and the said John Cramer, 2d, having sufficient and competent power and authority to administer the said oath to the said Patrick McKinney in that behalf.

“And then and there, on the trial of said issue, it became and was a material question whether or not, in or about the month of July, one thousand eight hundred and fifty-six, the said Patrick Larkin, the plaintiff, bought twenty lambs of the said Platt R. Doughty, the defendant, at the farm of the said Platt R. Doughty, in the town of Halfmoon, in the said county of Saratoga, at and for the price of two dollars a-piece; and whether or not four of the said lambs were delivered to the said Patrick Larkin; and whether or not

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the rest were to be delivered at any time when the said Patrick Larkin would come after them; and whether or not the said bargain was made in the field where the said lambs then were; and whether or not the said Patrick McKinney was present and heard the said contract and the conversation between the said Patrick Larkin and the said Platt R. Doughty in relation to said lambs.

"Thereupon, the said Patrick McKinney being so produced and sworn as aforesaid, and being then and there lawfully required to testify and depose the truth on the trial of said issue, designing and wickedly intending to prevent the due course of justice, and to cause a judgment to pass and be rendered against the said Platt R. Doughty, and in favor of the said Patrick Larkin, plaintiff in said action, did then and there, before the said John Cramer, 2d, then there being such justice of the peace, as aforesaid, willfully and corruptly swear and give evidence on the trial aforesaid falsely, amongst other things, in substance, as follows:

"That the said Patrick McKinney was present when Patrick Larkin, the plaintiff, had a conversation with Platt R. Doughty, the defendant, about some lambs; that this was about four weeks before the time of the said trial before the said justice; that the said conversation took place on the premises of the said Platt R. Doughty, in the town of Halfmoon, in the county aforesaid; that the said Patrick Larkin bought twenty lambs, at two dollars a-head, of the said Platt R. Doughty; that four of the said lambs were delivered; that the rest or residue of the said lambs were to be delivered at any time when the said Patrick Larkin should come after them; that said bargain was made on the premises of the said Platt R. Doughty, as aforesaid, down in the field where the sheep were, about a mile and a half from the house; that the said Patrick McKinney went down into the field where the sheep were with the said Patrick Larkin and the said Platt R. Doughty, and that no one was present when the bargain was made except the said Patrick Larkin,

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Platt R. Doughty, and him, the said Patrick McKinney: whereas, in truth and in fact, he, the said Patrick McKinney, was not present when Patrick Larkin, the plaintiff, had a conversation with Platt R. Doughty, the defendant, about some lambs; and whereas, in truth and in fact, the said Patrick Larkin did not buy twenty lambs of the said Platt R. Doughty; and whereas, in truth and in fact, no portion or number of the said lambs were to be delivered to the said Patrick Larkin at any time or times; and whereas, in truth and in fact, the said Patrick McKinney did not go over into the field where the sheep were with the said Patrick Larkin and the said Platt R. Doughty; and whereas, in truth and in fact, the said Patrick McKinney was not in the field where the sheep were, at any time, with the said Patrick Larkin and the said Platt R. Doughty.

“And the jurors aforesaid, upon their oath aforesaid, do say: That the said Patrick McKinney, on the said twentieth day of August, in the year one thousand eight hundred and fifty-six, at the said town of Waterford, in the county of Saratoga aforesaid, before the said John Cramer, 2d, then and there being such justice of the peace as aforesaid, wickedly, willfully and corruptly did commit willful and corrupt perjury, in contempt of the people of the State of New-York and their laws, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.”

On the trial in the Sessions, the pendency of the suit before the justice of the peace was proved as set forth in the indictment, and also that the defendant testified as is therein alleged. Three witnesses testified that the prisoner was not present at the making of the bargain between Larkin and Doughty, but that Larkin and the prisoner came together to the farm of Doughty, with a span of horses; and that Larkin left the prisoner with the horses, to take care of them, while Larkin and Doughty went away to a different part of the farm, and into another field, to see the lambs

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which Larkin had come for the purpose of buying; and that none of the conversation in regard to the purchase took place in the presence of the prisoner, except the proposition to go down and look at the lambs. The constable that arrested the prisoner testified that the prisoner escaped from him after his arrest, and was retaken, and that the prisoner while in his custody admitted that he did not go at all into the field where the lambs were, but that he stayed with the horses; and that when the constable asked him why he had sworn so, he said that Larkin told him he would make it all right.

The counsel for the prisoner asked the court to charge that the testimony of the prisoner on the trial before the justice, so far as it related to his having gone to or been in the field when the bargain between Larkin and Doughty was alleged to have been made, and to his having been present at the making of such bargain, and to the presence thereof of no other person but himself and the said Larkin and Doughty, was immaterial to the issues pending before the justice, for the reason that it was undeniable, from the evidence, that the bargain testified to by the prisoner was in fact made at the time and place testified to by him, and that if he had actually obtained knowledge of the existence of such bargain, previous to such oath, by information of the parties, or in any manner fairly entitling him to believe in its existence, it was totally immaterial whether or not he was actually present when or where the bargain was made, or who was present; and although his testimony might be false in those respects, he could not be convicted of perjury therefor. The court declined so to charge, and the prisoner's counsel excepted.

The prisoner's counsel further asked the court to charge that the prisoner could not be convicted under the indictment, on the ground that, although in his testimony as to the existence of said bargain he testified truly, he nevertheless did not know that his testimony in that respect was

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true, or upon any like ground in substance, for the reason that said indictment charged no such offence, and did not contain any assignment of perjury embracing any such ground of accusation. The court refused so to charge, and the prisoner's counsel excepted.

The court charged that although the evidence of the prisoner before the justice, concerning the existence and terms of the bargain between the said Larkin and Doughty, was all true, yet, if the jury believed from the evidence that the prisoner, at the time of such testimony, did not know the same to be true, or have such knowledge or information concerning said bargain as fairly justified him in believing his said testimony true, then the prisoner could be properly convicted under the indictment, and it would be the duty of the jury in that case to find a verdict of guilty.

The jury found the prisoner guilty.

W. A. Beach, for the prisoner.

I. The court erred in holding that the prisoner could be convicted, under the indictment, for swearing to the truth, not knowing it to be true. The indictment charges no such offence. The crime alleged is that of swearing a thing to be true which was not true. No conviction can be had except under the assignment of perjury in the indictment. (2 *Russ. on Cr.*, 542; 1 *Morris*, 341.)

II. It is immaterial whether or not the bargain prisoner swore to was made at the place testified to, and whether or not he was present; it being admitted, as it was, that the bargain was made.

John O. Mott (District Attorney), for the people.

I. The evidence of the prisoner, as to his having gone to and being in the field when the bargain between Larkin and Doughty was alleged to have been made; his having

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been present at the making of such bargain; and as to the presence thereof of no other person but himself and the said Larkin and Doughty, were facts circumstantially material upon the question of the prisoner's knowledge of the existence of the bargain to which he testified. They went to show his means of knowledge, and the amount of credit to be given to his evidence before the justice. They were material to his credibility and the admissibility of his evidence. (*Commonwealth v. Pollard*, 12 *Metc.*, 225; *Whart. Cr. L.*, 751, 3d ed.; *The State v. Wall*, 9 *Yerg.*, 347; *The State v. Lavallee*, 9 *Missouri*, 834; *The State v. Morris*, 9 *N. Hamp.*, 96; 2 *Russ. on Cr.*, 642, 7th *Am. ed.*) Whether the testimony was material was a question of law. (*Whart. Cr. L.*, 751.)

II. Though the thing sworn to may be true, yet if it was not known to be by the prisoner, it was perjury, inasmuch as he willfully swore that he knew a thing to be true which he knew nothing about. (2 *Russ. on Cr.*, 597, 7th *Am. ed.*; *The State v. Cruikshank*, 6 *Blackf.*, 62.)

The Supreme Court gave judgment overruling the exceptions and remitting the proceedings to the Saratoga County Sessions, with directions to proceed and render judgment on the verdict.

Conviction affirmed.

TOMPKINS OYER AND TERMINER. August, 1857. Before *Balcom*, Justice of the Supreme Court, and *H. Jennings* and *C. Burch*, Justices of the Sessions.

THE PEOPLE v. WILLIAM MASTERS.

Under the statutes of the State of New-York, the people are entitled to two peremptory challenges. (*) (This decision is in accordance with *The People v. Caniff*, 2 *Park. Cr. R.*, 586; and adverse to *The People v. Henries*, 1 *Park. Cr. R.*, 579.)

THE prisoner was tried on an indictment which charged him with killing Timothy Raudon, at Ithaca, on the 5th day of November, 1854, without the authority of law, by poison called arsenic.

One Scott was called as a juror, and was challenged peremptorily by the district attorney; whereupon the prisoner's counsel objected, and insisted that the district attorney was not entitled to challenge any juror peremptorily; but the court, after deliberating upon the question, by Balcom, J., overruled the objection, and held that the district attorney had the right peremptorily to challenge two of the persons drawn as jurors for the trial of the prisoner. (*Laws of 1847, ch. 134, § 1; 2 R. S., 734, § 11.*)

This decision is sustained by the adjudications in *The Waterford and Whitehall Turnpike Company v. The People* (9 *Barb.*, 161); *The People v. Caniff* (2 *Park. Cr. R.*, 586); and it is adverse to the case of *The People v. Henries* (1 *Park. Cr. R.*, 579), also to that of *The People v. Aichinson* (7 *How. Pr. R.*, 241).

Scott was rejected as a juror. One Sullivan was also challenged peremptorily by the district attorney, and he was not allowed to sit as a juror.

The prisoner was acquitted by the jury.

(*) By chapter three hundred and thirty-two of Session Laws of 1858, five peremptory challenges are given to the people, in cases punishable by death or by imprisonment in a state prison for ten years or over, and three peremptory challenges where the punishment is less than ten years.

DELAWARE OYER AND TERMINER, September, 1857. Before *Ransom Balcom*, Justice of the Supreme Court, and *D. A. Bostwick* and *C. H. Bell*, Justices of the Sessions.

THE PEOPLE v. SETH GOODRICH.

Courts of Oyer and Terminer have power to grant new trials, in cases of conviction upon insufficient evidence, or where verdicts have been rendered against evidence; but the power ought not to be exercised except in cases where it was the duty of the court to advise the jury to acquit the defendant, or to inform them that it was unsafe to convict upon the evidence before them.

In cases of doubt, where the evidence is conflicting and the credibility of the witnesses is in question, and no error has been committed by the court in its charge, a new trial will generally be denied.

THE defendant was tried on an indictment which charged him with perjury, in swearing to an affidavit in October, 1856. The evidence was conflicting, and the case was submitted to the jury under a charge from the court to which the defendant's counsel did not except, and the jury found the defendant guilty. The defendant's counsel applied for a new trial on the ground that the evidence was insufficient to sustain the verdict of the jury, and was against evidence.

The motion for a new trial was argued by

J. Grant (District Attorney), for the people.

S. Gordon and *William Yeomans, Jr.*, for the defendant.

By the Court, BALCOM, J.—We entertain no doubt but that Courts of Oyer and Terminer have power to grant new trials to prisoners who have been found guilty upon insufficient evidence, or where verdicts have been rendered against evidence. (*The People v. Stone*, 5 *Wend.*, 39; *The People v. Morrison*, 1 *Park. Cr. R.*, 625.) But before a Court of Oyer and Terminer ought to exercise this power, the case should be such as to have made it the duty of the court to advise the jury to acquit the defendant, or that it was unsafe for them to convict him.

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The case before the court does not quite come up to this standard; in other words, it does not fall within this rule. The evidence was conflicting; and the authorities are, if there be conflicting evidence on both sides, and the question be one of doubt, the verdict will generally be permitted to stand. (*Whart. Cr. L.*, 894, 2d ed.) No fault has been found with the charge of the presiding judge to the jury, touching any question of fact in the case. The jury were told, if they believed the principal witness for the defendant, they ought to find the defendant not guilty; and there were facts and circumstances before them, aside from the peculiar nature of the story told by the witness and his manner of detailing it, which, upon one construction, authorized them to disbelieve him. If no evidence had been given on the part of the defendant, enough was proved to sustain the finding of the jury; and they have found that the evidence for the people was true, and that of the main witness for the defendant false. It was their province to determine the credibility of the witnesses, and their verdict is conclusive upon the defendant.

The condition of the case is such that we must regard the defendant's evidence as out of it, or as false, in determining the defendant's application for a new trial. We cannot, therefore, grant a new trial, although we should have been better satisfied with the action of the jury if they had acquitted the defendant.

Motion for a new trial denied, and the defendant sentenced to imprisonment in the state prison for the term of two years.

SUPREME COURT. At Chambers, New-York, September 9, 1857.
Before *Peabody*, Justice.

THE PEOPLE *v.* EMMA AUGUSTA CUNNINGHAM.

The action of a committing magistrate is not final on the question of admitting to bail.

Where the crime charged and the circumstances are such that a bail bond will afford reasonable assurance that the accused will appear to stand trial, it is his right that the bond should be accepted in lieu of his personal detention. The right to detain for trial, being a restraint upon personal liberty, is limited to the necessities of society, and when other adequate security can be had the necessity for personal detention does not arise, and a resort to it is not warranted by law, but is illegal, unjust and oppressive.

In determining whether such security would be adequate, it is necessary to consider the nature of the offence charged, the probabilities of conviction, the penalty to follow it, and the position, sex, social and family relations, and pecuniary means of the accused.

What constitutes the offence of fraudulently producing an infant, falsely pretending it to have been born of parents whose child would be entitled to inherit property, with the intent of intercepting the estate, as described in 2 Revised Statutes (*p.* 676), discussed, on deciding to admit a person accused of such felony to bail in the sum of \$5000.

THIS cause came before Mr. Justice Peabody, at chambers, on *habeas corpus*, issued on the application of the defendant, for the purpose of having the defendant admitted to bail. The facts are fully stated in the opinion of the judge.

L. S. Chatfield, for the defendant.

A. Oakley Hall (District Attorney), for the people.

PEABODY, J.—The prisoner is before me on a writ of *habeas corpus*, addressed to John Gray, warden of the city prison, asking to be admitted to bail. The return to the writ shows that she is detained in prison by virtue of a commitment by a police justice, on the charge of “having feloniously and fraudulently produced an infant, falsely pretending it to have been born of parents whose child would have been entitled to a share of the personal estate, and to inherit

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the real estate of Harvey Burdell, deceased, with the intent of intercepting the inheritance of such real estate or the distribution of such personal property from the persons lawfully entitled thereto."

Annexed to said return is a statutory writ of *certiorari*, on which is written a discharge of the writ, by Judge Daly, of the Court of Common Pleas. That writ is addressed to the clerk of the Court of General Sessions, commanding him "to certify to Judge Daly the day and cause of the imprisonment of Emma A. Burdell, and the preliminary affidavits, &c., of William S. Davison, one of the police justices," &c.

Annexed to this writ is the return of the clerk to whom it is addressed, in substance that he had no personal or official knowledge of the day and cause of imprisonment of the said Emma A. Burdell, but that he returns certain affidavits against her on a charge of felony, which have been certified to the Court of General Sessions by the magistrate taking the same. The affidavits referred to in the return are not annexed, and do not appear before me. There is also annexed to the writ of *habeas corpus*, as if a part of the return to it, an extract from the minutes of the clerk of the Court of General Sessions, stating that a motion was made in that court to admit the prisoner to bail on the 12th day of August, 1857, which was denied.

These papers, the writ of *certiorari* and the return, and discharge indorsed, and the extract from the minutes of the Court of Sessions, are annexed to and seem to form a part of the return of the warden of the city prison to the writ of *habeas corpus* on which the prisoner is brought before me.

The prisoner answers to the return by interposing a traverse, and claims that she is illegally detained; and, to show this, she sets forth a copy of the proofs before the magistrate, so that the case presented to him is before me.

A motion is made on behalf of the people, that the *habeas corpus* be discharged, on the ground that the question of bail is *res adjudicata*.

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First. That the magistrate, before whom the examination was had, refused to admit to bail.

Second. That the same question was decided adversely to the applicant, by Judge Daly, on the writ of *certiorari*.

Third. That a motion has been made in the Court of Sessions for the same purpose, which has also been denied.

As to the proceedings before Judge Daly, there is nothing before me to show that the question of admitting to bail was ever passed upon, discussed or raised there, even assuming all the papers before me as a part of the return of the warden of the prison to be properly here, proving their own genuineness and establishing all the facts stated in them. The papers returned to Judge Daly, on that writ do not appear before me, nor is there contained in his discharge any intimation of what was done before him. The more appropriate office of the writ of *certiorari*, in such case, is to revise the proceedings before the magistrate, and see whether any error in law was committed by him, and particularly whether he had, properly, jurisdiction of the matter. It is not usually resorted to alone for the mere purpose of moving to admit to bail; and I doubt if it has been deemed the appropriate writ for that purpose, except when issued with and in aid of the writ of *habeas corpus*, which it was not in that case. I cannot therefore infer, from the fact that a writ of *certiorari* was issued, and afterwards discharged by him, which is really all that I have any evidence was done, that the question of bail was raised and decided on that occasion; much less can I assume that, either before him or the Court of Sessions, the question of admitting to bail was presented and decided on the same state of facts as presented before me, which must have been the case to constitute it an estoppel, on the ground that the question was *res adjudicata*.

Estopples are not favored in law, and the party seeking to avail himself of one must set forth all the facts necessary to establish it. On the part of the prisoner, it was denied

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most positively that either of those learned judges did examine and pass upon that question; and certainly the papers before me fall far short of setting forth the facts in a manner sufficiently full and definite to authorize me to adjudge that they did. The extract from the minutes of the Court of Sessions does not show on what papers or facts the motion was made, and it is conceded practically that the person of the prisoner was not before either of those judges to give jurisdiction of her person.

A motion was made on behalf of the prisoner to have all the papers returned by the warden of the city prison, except the commitment, stricken from the record as not being properly there, and I think it should be granted. (2 *R. S.*, 799, § 47; *Bennet v. The People*, 4 *Barb.*, 31; *Mercien's case*, 25 *Wend.*, 48-82, 84; 3 *Hill*, 416; 25 *Wend.*, 78-90.) If they are admissible at all, they are not so as a part of his return. They should have been introduced on behalf of the people. But they are probably not admissible at all under the objection by the prisoner. If Judge Daly, or the Court of Sessions, having jurisdiction of the matter and the person, entertained a motion for bail on the facts shown before me, and made an order dismissing it, a properly certified order or copy of the order showing the facts would be competent evidence of them and of the judgment thereon; but these papers are not proper evidence of it, and if allowed to stand as a part of the return of the warden they are not sufficient to establish the facts claimed, in the face of the denial of it by the prisoner. No other evidence that it did occur having been offered, I presume no better or further evidence can be given. If the decision by the committing magistrate and those made subsequently were, as is claimed here, final in their nature, then was the question already *res adjudicata* when it came before Judge Daly, and it had been twice finally adjudicated when afterwards it came before the Court of Sessions, and on the same principle it was finally adjudged there for the third time. It is

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not pretended that in either of those cases the consideration of the merits was refused on the ground that the prisoner was estopped by the previous decisions. On the contrary, it is insisted by the prosecution that the question was decided on its merits on both and all occasions. If each of these decisions was in its nature final, the principle on which I am asked to dismiss this writ has been already twice violated in this case, which I am slow to believe.

The action of the committing magistrate is not final in its nature, and there is not before me any sufficient evidence that the question, as presented here, has ever been judicially determined by any other court or officer having jurisdiction to pass upon it, and I am bound to entertain the motion on its merits.

These preliminary objections being disposed of, it remains for me to decide whether this is a proper case for bail, and, if so, to fix the amount of bail proper to be taken. Is this a proper case for bail? Society has a right, when a crime has been committed, to punish the author of it, and, for that purpose, when facts are shown which indicate with a reasonable degree of probability that any certain person is guilty of it, it is the right of society to have such person properly brought to trial, that his guilt or innocence may be ascertained.

For the purpose of securing his presence for trial, and, if convicted, subsequently for punishment, he may lawfully be restrained of his personal liberty and detained in custody, unless he elect to give such pledge as affords a reasonable security that he will appear at the time and place fixed for trial. Such reasonable security for the appearance is all that society has a right to in that respect; and when the crime charged and other circumstances are such that a bond will afford reasonable assurance that he will appear to stand trial, it is the right of the accused that the bond should be accepted in lieu of his personal detention for the time. This is the law of our land. It is consistent with reason and

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humanity. It answers all the necessities of society, and with the least amount of privation to the individual consistent with the paramount right of society.

The right to detain for trial by a restraint of personal liberty is limited to the necessities of society; and when other adequate security can be had, the necessity for personal detention does not arise, and a resort to it is not warranted by law, but is illegal, unjust and oppressive. What are the rights of society and what those of the individual in this case? Will a bond in a pecuniary penalty afford reasonable security that the accused will appear in compliance with it and submit herself to trial? The forfeiture of such a bond would merely give to the state the amount of the penalty in money, which would not afford compensation for a failure of justice; and, in examining this question, I am to look chiefly, if not entirely, to the probability of its answering the end of rendering her appearance sure. In determining whether such security would be adequate, the circumstances of the case must be considered. Prominent among them are the nature of the offence charged and the penalty to follow upon conviction. And first, as to the nature of the offence: what amount of odium would attach to a conviction of it? The production of a child, falsely pretending it to be born of parents whose child would be entitled to property, with the intent to divert such property from the legal channels of descent, and thereby defraud those who are legally entitled to it; an attempt, by the production of a fictitious heir, to defraud real heirs of their legal rights; an attempt, by one grand falsehood, sustained by numerous other untruths, to deprive persons of property to which they are legally entitled; this seems to suggest the moral grade of the offence, which should determine the measure of odium to be visited upon a conviction. Next, what is the legal penalty to which she is exposed? This is imprisonment in the state prison for a term "not exceeding ten years." The medium between the greatest and the least

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amount of punishment allowed by law would be five years' imprisonment, and this is certainly sufficient to make one shrink from exposure to it, and seek to avoid it with no little zeal, and without regard to small sacrifices. A delicate woman, especially, must be supposed to look with horror at the possibility of such a result. Next come the probabilities of conviction; and all experience has shown that this consideration is usually the most prominent in the human mind, in determining the amount of sacrifice to be made and hazards to be encountered for the sake of avoiding a trial. The prospect of any term in state prison is usually esteemed by the accused of vastly more consequence than the extent of the duration of that term. The mind shrinks from contemplating at length what is to follow after entering that sepulchre,—the progress of time, the revolution of the seasons, the succession of events in that other world,—and, for most purposes, limits its survey to the yawning portals, the approach to them, and the moment at which they are to be passed. The chances of conviction, then, are of the first importance in calculating the probability of one's appearance for trial in compliance with a bond. The facts in this case, as presented by the prosecution, are, that the accused, after feigning pregnancy for sufficient time, was found in her chamber, in the night, in bed, having by her a child of which she affected to have been recently delivered, and which she said, when asked by some visitors, was the offspring of herself and Dr. Burdell. She had previously claimed to be the wife of Dr. Burdell, who was then deceased, having left a considerable estate, which, if she were his wife and this were their child, it would be entitled to inherit. The intent on her part, from the evidence of the prosecution, seems pretty certainly to have been at some time to make a claim, on behalf of this child, to the estate of the deceased Dr. Burdell; and the great question is, was this a fraudulent production of a child, falsely pretending it to have been born

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of parents whose child would be entitled to inherit, with the intent thereby to intercept the inheritance?

The question seems to divide itself into several :

First. Was it a fraudulent production of the child?

Second. Did she falsely pretend that it was born of certain parents?

Third. Would a child of the parents of whom she pretended it was born be entitled to inherit?

Fourth. Was it her intention, by this fraudulent production, to intercept the inheritance?

First. Was the production of this child, under the circumstances, a fraud in law? Was any fraud in law perpetrated? Was any fraud attempted at that time? If there was any fraud perpetrated or attempted, against whom was it attempted? Who was, by this production of the child, defrauded or attempted to be defrauded? Was it Dr. Montagne, or Captain Speight, or Inspector Dilks, the persons to whom she said, in answer to their inquiries, that it was her child? The child was there, and was carried thither, directly or indirectly, by her. But she had made no statement or claim respecting it, except to answer certain questions proposed to her; and if she had then proclaimed that it was the offspring of herself and Dr. Burdell, I do not see that it would be material. She intended, probably, at some future time, to perpetrate a fraud, or to attempt one, and this child may have been provided for the purpose as a means or instrument to be used in its accomplishment. She intended at a future time fraudulently to produce that child, and to assert its rights, as the offspring of herself and Dr. Burdell, to the property left by him. Did she so produce it at that time? She had made no such claim, and it seems to me quite doubtful if the fraudulent production contemplated by the statute was there made at the time she was arrested in her course; and without dwelling to show by what process of reasoning I arrive at the result, further than is suggested above, my conclusion is that there is at least great doubt,

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even assuming the facts to be exactly as claimed by the prosecution, and susceptible of no contradiction or modification, whether a fraudulent production, such as the statute contemplates, and such as is declared to be a felony and punishable by imprisonment at hard labor for ten years, was there made and completed.

Second. Did she falsely pretend that it was born of certain parents, herself and Dr. Burdell? She certainly did, if I understand the meaning of her language.

Third. Would a child of the parents of whom she pretended it was born, that is, of herself and Dr. Burdell, be entitled to inherit? There is no evidence or claim that it would; on the contrary, the previous pretence of the accused in that respect is substituted and relied on by the prosecution for the legal fact. She had previously claimed or pretended to be the wife of Dr. Burdell, and if she had been so, a child of them would have been entitled to inherit. Her previous claim in that respect is the only evidence of the fact. This claim of hers, to be evidence at all, must, I suppose, come under the head of confession, and would be slight evidence of such a fact. She probably thought that a child of herself and Dr. Burdell would be allowed to inherit. There is no evidence that it would, however, and I think the case not without difficulty at this point. The production of a child, pretending it to have been born of parents whose child, it is pretended, would be entitled to inherit, is not the crime described in the statute. The pretended offspring of a pretended marriage is not the child whose production is so severely punished. The danger to society of a simulated marriage is not greater than that of other false pretences. The fact of a marriage is one which may be ascertained with the same care as other facts, and no stringent enactment has been made against such a pretence because none has been deemed necessary; but the facility with which spurious offspring of a genuine marriage may be imposed, and the great difficulty in detecting such a

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fraud where a marriage really exists, has been deemed to require the most rigorous punitive enactment for the protection of society. Not so, however, with respect to a pretended marriage, for that may be more easily detected, and no such stringent legislation against such a pretence is required, and never has been made.

Fourth. Was it her intent, by this production, to intercept the inheritance? The fraudulent production, the false pretence that it is born of parents whose child would be entitled to inherit, and the intent to intercept the inheritance, must unite to constitute the crime. We will assume that there was the fraudulent production and the false pretence as to its birth: What intention was there by that production and false pretence, at that particular time and place, to intercept the inheritance? Was there the intent, by the act accompanying it, which is requisite to constitute the crime? Was not all this scene in contemplation of and preparatory to acts intended to be performed at a future time, which acts would probably (had they been realized) have constituted the offence which the statute designed to punish? This statute has never received a judicial construction, that I am aware of, and no analogies for its construction have been suggested. Of course I am left without those aids in my endeavors to find a proper construction for it; and, in the brief and summary manner in which this matter has been disposed of, I can only hope to arrive at general accuracy in the result to which I shall come. To my mind there is great difficulty in applying this statute to the facts presented in this case; and I come readily, therefore, to the conclusion that there are very serious doubts about a conviction under it being practicable. Other circumstances of this case are also worthy of consideration. Her position in life, her social and family relations, the innumerable ties which have more or less restraint in every case, and her pecuniary means, may all be considered; but above all cir-

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cumstances to be considered in this connection is her sex, which diminishes immeasurably, in my judgment, the power and probability of escape. This, in connection with her children, numerous, helpless and dependent, and each a hostage to society that she will remain where she can be subjected to the operation of law, seem to be of themselves almost adequate recognizances for her appearance for trial, and, strengthened by a bond for a reasonable amount, may, I think, be relied on, under all the circumstances, with entire safety. Perhaps no occurrence within our time has so electrified society, throughout all ranks and classes, as this and one shortly preceding it, with which, in the public mind, this unfortunate accused was also associated, and certainly no person under suspicion was ever more rigorously dealt with by public opinion; and it is not remarkable that, under the influence of the prevailing sentiment by which every one must be affected in a greater or less degree, it should have been difficult to convince a conscientious and enlightened judge that it was safe and proper to admit her to bail. But now that the lapse of time has allowed the tempest of public feeling to subside, it would be not a little remarkable if a magistrate should be found to adjudge, upon all the circumstances of this case, that no amount of bail would render her production for trial reasonably secure. The value of this right, to be discharged on giving bail, to her and her family at this most critical juncture, when, in addition to all ordinary reasons, its importance is immeasurably enhanced by her necessities for it, to enable her to prepare for the ordeal through which she is about to pass, is too apparent to call for a remark. But the importance to society, that the law which depends for the support and enforcement on the respect and confidence it should maintain in the minds of the public, should not be allowed to work injustice and oppression, is no less momentous; for, with us, nothing can be more fatal than a distrust of public justice. The scenes of violence and outrage occurring from

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time to time in regions which we are accustomed to regard as less favored than our own, are not more to be deprecated because they are done in open defiance of law. On the contrary, the same amount of injustice perpetrated in the name and under the forms of legal justice, would go farther to undermine and break down society, because it would assume the livery and feign the sanctity of judicial enactment.

My conclusion is, that the ends of public justice will be answered by admitting the prisoner to bail in the sum of five thousand dollars.

SUPREME COURT. New-York General Term, October, 1857. *Mitchell, Davies and Clarke, Justices.*

THE PEOPLE v. EMMA AUGUSTA CUNNINGHAM.

Though the action of a committing magistrate or court, on the question of admitting to bail, is the subject of review by an appellate jurisdiction, yet it is final as to other magistrates or courts of coördinate or concurrent authority on the same question.

Where bail had been refused by the committing magistrate, and also by the Court of General Sessions, in which court the indictment was pending, and a justice of the Supreme Court afterwards decided, at chambers, to admit to bail, the decision of the justice was reversed, on *certiorari*, by the Supreme Court, sitting in general term, on the ground that the question was *res judicata* when brought before the justice of the Supreme Court.

But when bail has been refused on account of insufficiency, the decision does not preclude a new application for a discharge on offering other bail.

Forms of writ of *certiorari*, for review of decision of judge at chambers admitting to bail, allowance of writ, and affidavit on which writ was allowed.

THIS matter came up on *certiorari*, directed to Mr. Justice Peabody. The affidavit, allowance and writ were as follows:

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City and County of New-York, ss :

A. Oakey Hall, district attorney of the county of New-York, being duly sworn, deposeth and saith : That on or about the thirty-first day of August last, a writ of *habeas corpus* was issued out of the Supreme Court, allowed by and returnable before the Honorable Charles A. Peabody, commanding the warden of the city prison to produce before him the body of one Emma Augusta Cunningham, otherwise Burdell, with the day and cause of her imprisonment. That, accordingly, on or about the first day of September, instant, the warden of the city prison, to whom said writ was addressed, produced the said body before the Honorable Charles A. Peabody, with a certain commitment of one William S. Davison, a police justice of the city of New-York, committing the said Emma Augusta Cunningham, otherwise Burdell, to the city prison, without bail, on a charge of felony, of which due return was made. That, thereupon, the said return was duly traversed, and argument had upon the same. That, on the tenth day of September, instant, the said Honorable Charles A. Peabody made a final adjudication of the matters which had so arisen, by writing his certain order on the writ in these words and figures :

“The within prisoner having given bail is discharged from custody and imprisonment.

“Sept. 10, 1857.

“C. A. PEABODY.”

And further deponent saith not.

A. OAKEY HALL.

Sworn to before me, this 10th }
day of September, 1857. }

J. J. ROOSEVELT.

Upon the above affidavit let there issue the statutory writ of *certiorari*, directed to the Honorable Charles A. Peabody, the officer in said affidavit named, returnable the second

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Monday of September instant, at the general term of the Supreme Court to be held on that day in the first judicial district.

J. J. ROOSEVELT.

Dated New-York, Sept. 11, 1857.

The People of the State of New-York, to the Honorable Charles A. Peabody, one of the justices of our Supreme Court, sitting in commission in a matter of *habeas corpus*, greeting :

Whereas, we have been informed, by the official affidavit of the district attorney of the county of New-York, that a writ of *habeas corpus* was heretofore issued by you on behalf of one Emma Augusta Cunningham, directed to the warden of the city prison in the city of New-York, and requiring him to have her body before you, to be dealt with according to law :

And whereas, pursuant to the requirement of the said writ, the body of the said Emma Augusta Cunningham was brought before you, and such a return made to the said writ of *habeas corpus* ; that thereupon you proceeded to hear the several matters arising thereupon, and that thereupon, after these proceedings were had, you, the said justice, did discharge the said Emma Augusta Cunningham, otherwise Burdell, from the custody or restraint of the said warden, upon bail : And we being willing to be certified of such proceedings as were had before you, do hereby command you to certify and return the said writ of *habeas corpus*, the petition therefor, the return thereto, and all such other papers and due proceedings as were thereupon severally had before you, unto our justices of our Supreme Court, at the City Hall, in the city of New-York, on the second Monday of September instant, at the general term of said court, under your hand, as fully and amply as the same remain before you, so that our said justices may further cause to be done

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thereupon what of right and according to law ought to be done; and have you then there this writ..

Witness, the Honorable James J. Roosevelt, one of the justices of our said court, at the City Hall, in the city of New-York, the eleventh day of September, in the year of our lord one thousand eight hundred and fifty-seven.

A. OAKLEY HALL,

District Attorney for the People.

R. B. CONNOLLY, *Clerk.*

To this writ Mr. Justice Peabody returned the petition for *habeas corpus*, the writ of *habeas corpus*, with the return thereto, and the traverse to said return, his final order of adjudication admitting to bail, and his opinion in support of such decision.

A. Oakley Hall (District Attorney), for the people.

I. Commissioner Peabody erred in bailing the prisoner, for the question of bail was *res adjudicata*. 1. The court of General Sessions certainly had jurisdiction of the motion to bail under 2 *Revised Statutes* (p. 710, § 31). It was the court having original jurisdiction, and superior to that of a commissioner in *habeas corpus*. It was *res adjudicata* upon the question of bail, both *in rem* and *in personam*. The subject matter and the persons before the commissioner were identical with that and those before the court; and no new facts were alleged to change the aspect of the question. The action of the court was as much of a final judgment upon the motion as could be given thereupon. If the prisoner desired relief she could have brought her *certiorari* to the Supreme Court, but had no legal power of appeal from the court to a commissioner, by the collateral method employed. Suppose Commissioner Peabody had also refused bail, could the prisoner take collateral appeal upon appeal, through the whole alphabet of officers who possess power to issue writs

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of *habeas corpus*, and to bail prisoners, until her desired relief was obtained? Could the people, the party with whom she litigated, acquire no rights under the various adjudications? The action of the Court of Sessions may be considered as analogous to action upon *habeas corpus*. The court, by virtue of the statute, have jurisdiction after final commitment of bodies, and of offences of prisoners charged with crimes triable in that court, a jurisdiction coextensive with any enjoyed under writs of *habeas corpus* and *certiorari*. (*Barry v. Mercein*, 25 *Wend.*, 64; *In matter of Da Costa*, 1 *Park. Cr. R.*, 136; *In matter of John B. Overton*, order of *Whitney, J.*, MS.) 2. We have said nothing of the matter being *res adjudicata*, in consequence of the proceedings before Justice Davison. The police justice has power to adjudicate upon bail coextensive with the court of General Sessions. He is enumerated in the same section with justices of the Supreme Court, &c. (2 *R. S.*, 893, § 31, *subd. 4*.)

II. But if the question of bail was open before Commissioner Peabody, he erred in allowing bail to the prisoner. She was taken in *flagrante delicto*, committing a felony, and offers no defence to, nor explanation of her acts, except in effect a demurrer to their legal sufficiency under the statute. If the statute has been violated, she is liable to ten years' imprisonment in the state prison. Even if Commissioner Peabody be correct in his application of the facts to the statute, she was guilty of an attempt at the alleged felony, which attempt renders her liable to five years' imprisonment in the state prison. (*In re Robinson*, 25 *Eng. L. and Eq.*, 216; *Ex parte Tayloe*, 5 *Cow.*, 39; 2 *Benn. & Heard*, 573; 3 *Hill*, 672; *United States v. Johns.*, 4 *Dall.*, 412; *Commonwealth v. Traske*, 15 *East*, 277; 1 *Greenleaf's Ev.*, § 382; *Whart. Am. Cr. Law*, 496; 2 *R. S.*, 748, § 46; 1 *Park. Cr. R.*, 367.)

L. S. Chatfield, for the prisoner.

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By the Court, CLERKE, J.—The respondent in this *certiorari* was committed to close custody on the eleventh day of August last, by the Police Justice Davison, for an alleged felony. On the same day, she sued out a writ of *certiorari*, returnable the next day before Judge Daly, one of the judges of the Court of Common Pleas for the city and county of New-York. The cause, being in the Court of General Sessions, this writ was directed to its clerk, who returned the depositions on which her commitment by the police justice was founded, duly certified by him. The depositions thus became a record in that court. Judge Daly, after hearing counsel on both sides, discharged the writ sued out before him. Within a short time after the failure of this application to Judge Daly, a motion was made by the counsel for the respondent, before the Court of General Sessions, to admit her to bail, by virtue of the statute giving Courts of General Sessions power to let to bail persons committed to prison before indictment, for any offence triable in that court. (2 R. S., 710, § 34, (31) 1st ed.) It appears from a certified extract from the minutes of the court, that this motion was denied; having been made, of course, in open court, and the district attorney having been heard in opposition. It is admitted, I believe, that the respondent was not personally or corporeally present in court when this motion was made; and, on the other hand, it is not denied that it was made on her behalf and with her concurrence.

On the thirty-first of August, the respondent sued out a writ of *habeas corpus*, returnable before Mr. Justice Peabody, one of the justices of the Supreme Court; and thus she renewed, for the fourth time, her application for bail. In the petition addressed to Judge Peabody, praying for this writ, she states that she is held in custody, and is imprisoned under a certain commitment, issued by the police justice, a copy of which, containing the alleged cause of her imprisonment, she annexed to her petition, making it a part

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of the petition. She also states, in reference to the imprisonment, that it was illegal, "as she was entitled to bail and was ready, and offered to give sufficient security;" so that it appears on the face of the petition that her right to bail, or, at least, the propriety of granting it, was submitted to the committing officer at or about the time he ordered her imprisonment. She also prays that the writ of *habeas corpus* issue, directed to John Gray, warden of the city prison, commanding him to have her body, with the time and cause of her imprisonment, before the judge, at the chambers of the Supreme Court, and that she be admitted to bail. On the face of the writ itself, it appears that it was issued by Judge Peabody, at chambers; so that there is no foundation for the supposition, that it was issued by the court at special term, but on the contrary, it imports on its face to have been issued by a judge, acting out of court at chambers, in the manner in which proceedings of this description usually, if not invariably originate, and are conducted.

The warden, in obedience to this writ, produced the body of the respondent; at the same time making his return, consisting of the original commitment, the writ of *certiorari* before Judge Daly, and the order of the Court of General Sessions. The warden's return was traversed by the respondent, stating "that her imprisonment and deprivation of bail were unlawful;" "that the committing magistrate had not sufficient proofs before him to justify such commitment;" and she alleges, upon information and belief, "that the papers annexed to her traverse are true copies of such proofs, and the only proofs taken by such magistrate."

After argument before Judge Peabody, she was discharged on bail.

Those proceedings before Judge Peabody, are now here, on review at general term, for examination and correction, pursuant to the provisions of the Revised Statutes. (2 R. S., 573, § 84, (69.)

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Judge Peabody certifies, in his return to this court, that a motion was made by the relator to strike out of the return the papers annexed by the warden, being the *certiorari*, papers of Judge Daly, and the extract from the minutes of the Court of General Sessions, the decision of which motion he reserved; so that, if the motion ought to have been granted, the respondent is now entitled to the benefit of it. If it were granted, it is supposed by the respondent's counsel that nothing would be then legally before us but the mere warrant of the committing officer; and that there would be no proof that any officer, other than Judge Peabody, had judicially considered the legality or expediency of releasing the prisoner on bail.

Are these papers, then, not properly a part of the warden's return; or if not properly an essential and integral part of his return, were they otherwise improperly before Judge Peabody? Their genuineness is not impeached. It is not disputed that the proceedings took place before Judge Daly, and before the Court of General Sessions, and that they are duly authenticated; but on an inquiry, under the writ of *habeas corpus*, it is insisted that they were not fit and relevant subjects of consideration.

If the respondent's counsel mean to insist that Judge Peabody was bound to confine himself only to the process of commitment in order to ascertain if it was valid on its face, or to inquire whether the committing magistrate had jurisdiction, those additional papers would indeed be irrelevant, and consequently ought not to have been transmitted to him; but if this was the proper limit of Judge Peabody's inquiry, his decision was manifestly erroneous, for it is not pretended that the process was void on its face, or that the magistrate had not jurisdiction. If they insist, however, as they manifestly do insist, that he had a right to go behind the commitment and to inquire into the truth of the fact adjudged by the committing magistrate and to determine whether the offence charged was a legal offence, and if the prosecution,

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on the other hand, deny this and insist, as a preliminary objection, that those questions had been previously decided by an officer and a court of competent jurisdiction, it would be excluding what seems an essential preliminary inquiry, to confine the consideration of the judge at chambers to the mere commitment; and this would, in effect, be to prejudge, without investigation, the most important question presented by the district attorney, or, rather, it would preclude the possibility of considering it. Where the fact of a previous adjudication is insisted upon, and it is right that this fact should be presented to the judge, surely it is essential that proof of it should be placed before him, and whether it comes appended to the warden's return or is introduced by the prosecuting officer in the shape of proof *aliunde*, is a matter of no practical importance. This court will not, in any proceedings at chambers, require a strict adherence to technical rules, where justice is not prejudiced but rather promoted, even if they were generally applicable to such proceedings. The truth is, it is not necessary, in order to bring up all the papers deposited with the party who has custody of a prisoner, that a *certiorari* should also issue. All papers connected with any question cognizable by the judge before whom the prisoner is brought on *habeas corpus* are properly brought before him simultaneously with the return. It is the duty of the district attorney to see that the return states every cause that exists for the detention of the prisoner; whether it be a commitment alone, or, as in this case, a commitment and also the order of the Court of Sessions not to bail the prisoner, which were lodged with the warden. It would be a very idle ceremony, when the papers are once before him, for the judge then to issue a writ of *certiorari* requiring their production. They are produced, and their production being pertinent to the inquiry before him, they are deemed a part and parcel of the proceedings. I will, therefore, in this case, deem the order and papers which were before Judge Daly, and the extract

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from the minutes of the Court of Sessions, properly before Judge Peabody and properly before this court for review.

The matter, then, as we perceive from this return, from the whole case, and even from the language employed in the respondent's petition, shows that, first, the police justice entertained the question of bail and that he decided it; secondly, that the question was brought before Judge Daly on *certiorari*, and, although I am not quite clear on what ground he decided, he dismissed the writ and refused bail; and, thirdly, that a motion was regularly made in the Court of General Sessions, in which the respondent was to be tried; that this motion was made in open court by her counsel, and opposed by the district attorney, and, after hearing both counsel, it was denied.

The judge below seems to be of opinion that the action of the committing magistrate was not final, and that there was not before him (Judge Peabody) any sufficient evidence that the question had been judicially determined by any court or officer having jurisdiction to pass upon it.

If the judge means, by saying that the action of the committing magistrate "was not final," that it was properly the subject of review by an appellate jurisdiction, he is probably correct; but if he means that any other magistrate of coördinate or concurrent authority, concurrent, I mean, so far as the question of commitment or bail is concerned, has a right to reconsider the question, that is, to rejudge the judgment of the court which passed on that very question, after hearing the prisoner's counsel, he is, I think, in error; and his opinion is at variance with what I conceive to be the only safe and expedient practice, and with the current of authority on the subject. Propriety and public convenience demand, when a decision is once deliberately made in relation to any matter properly before a court or judge, and within their jurisdiction, that it should not be disturbed, except by appeal to a higher tribunal; but if one judge be permitted to interfere with another of coördinate or concur-

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rent authority, any other judge can interfere with him, and so it may be continued and repeated through the whole circle of the judiciary, to the great disquiet of the public business and to the reproach and hindrance of public justice. In the case of *The People v. Capels* (5 Hill, 167), which was to be sure a case of contempt, the court, upon referring to section forty-two of the *habeas corpus* act (2 R. S., 567) where the statute expressly forbids an inquiry into the justice or propriety of the commitment in such a case, adds: "If there had been no such statute, it is clear, upon principle, that *the judgment or decision of any court or officer of competent jurisdiction cannot be reviewed on habeas corpus*. If there had been error, the remedy is by *certiorari*, or writ of error." The judge has no authority to inquire into the truth of the fact adjudged by the committing magistrate. In the case of *Bennae v. The People* (4 Barb., 31), it is expressly decided that when the return to a *habeas corpus* says that the party is detained on any process, the existence and validity of the process are the only facts upon which issue can be taken. These are what are meant as the material facts within the forty-eighth section of the *habeas corpus* act (2 R. S., 569), not whether the process was founded on sufficient evidence or any evidence at all. It is unnecessary to refer to other cases. There seems to be a general concurrence with Mr. Hill in the remarks contained in his appendix to the third volume of his reports on this subject: "That the question whether bail shall be allowed or not is, in all cases of felony, purely judicial, not only before the appellate court or officer, but before the committing magistrate or court. The statutes, in giving power to bail, create no ministerial duty and impose no obligation beyond what rests upon any judge in the exercise of his powers as such. Thus, the direction to the court or officer to proceed and let the party to bail, if the case be bailable (2 R. S., 593, § 30), although mandatory in form; can only mean when it is properly bailable. A literal construction would be absurd."

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And again: "The examining magistrate enjoys a peculiar advantage, whether he is a justice of the peace or coroner, for determining the weight of evidence. It is made the duty of both to examine the witnesses for the prosecution and reduce their testimony to writing in the form of depositions. The magistrates have considerable power in compelling the attendance of witnesses."

But, in addition to the adjudication of the committing magistrate, Judge Daly entertained the question. There seems, at all events, to have been some discussion of it before him. As I have no reason, from the report before me, to feel assured that he passed upon the merits of the question, and as it is possible that he dismissed the matter on the ground that he did not consider it discreet to decide the question, or, more probably still, that it was *res adjudicata*, it is not, perhaps, expedient to deem his action, in reference to this subject, an adjudication. Indeed, the same objection would apply to his action in the matter, as to Judge Peabody's. With regard, however, to the decision of the Court of General Sessions, it is quite certain that the court had possession of the subject, and complete, undeniable jurisdiction of the person of the respondent. She was triable in that court; and they had power to let her to bail, if they thought proper. (2 R. S., 710, § 34 [31]). Being a party in a cause pending there, the application was properly made in her behalf by motion; and if properly made by motion, in a court in which she was a party to an action, both contestants being represented, and virtually present, no *habeas corpus* was necessary to bring her body before the court. On an application by motion, whether in a civil or criminal action, the bodily presence of the party making it can answer no purpose whatever. It is sufficient for the court to be assured that the application was made with the consent of the party. For us, it is only necessary to know that the court had power to entertain the motion, and that, in the exercise of this lawful authority, they did entertain it. Indeed, when

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the people make a motion against an accused party, the effect of which may be a judgment, the body ought to be brought up (1 *Park. Cr. R.*, 360, *obs. Judge Mitchell*); and, perhaps, as against a prisoner, the presumption of duress constantly exists, it is generally incumbent on the people, in every antagonistic step, to see that this forced jurisdiction is perfect. Without reference, then, to Judge Daly's decision, we find that two tribunals of competent authority adjudicated upon this question of bail; that, so far as we know, the matter was fully and deliberately considered by them; that the committing magistrate, to employ Mr. Hill's language, had peculiar advantages in arriving at a correct decision, and that the magistrate who discharged the prisoner on bail had no new state of facts before him to justify his interposition. He had, plainly, no better means than the police justice, if as good, of ascertaining whether the respondent was entitled to bail, or whether it would promote the ends of justice to admit her to bail. We do not believe that it would be consistent with the well established practice, or with the public safety, to allow one magistrate to disturb the decision of another magistrate, still less that of a court, in cases where the decision is founded upon deliberate inquiry into the merits. And, if we had to make a rule on this subject for the first time, we would consider it decidedly best to confine the reëxamination of decisions upon all subjects, as we think the law has long confined it, to an appellate tribunal, according to the usual course and practice of proceedings for the examination and correction of errors in an inferior jurisdiction.

In this case, the very issue joined on the motion in the Court of Sessions was, whether the prisoner should be let to bail, not whether certain bail were sufficient. That issue was decided against her, and was conclusive in every tribunal, except on appeal. It is unlike the question whether certain bail are sufficient; that does not preclude a new application for a discharge on offering other bail, for in such a

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case the first issue was not the same as the second; the first was whether the first bail were good; the second, whether the second bail were good.

Having arrived at this conclusion, it is unnecessary to consider the other questions entertained by Judge Peabody.

The court are unanimously of opinion that the proceedings should be reversed.

Proceedings reversed.

SUPREME COURT. Erie General Term. November, 1857. *Davis, Greene and Marvin*, Justices.

ALONZO P. WARREN, plaintiff in error v. THE PEOPLE,
defendants in error.

Keeping a bawdy house was an indictable offence at common law, and a person accused of it was entitled to a trial by jury, that right being secured by the state constitution of 1821; the provision of the Revised Statutes (1 R. S., 638, § 1), by which keepers of bawdy houses are declared disorderly persons, and subjected to summary punishment, is unconstitutional and void. The same constitutional provision being retained in the state constitution of 1846, a person arrested and brought before a magistrate has a right to give bail for his appearance before the next grand jury; and where such right was denied, and the defendant subjected to summary conviction before the justice, the conviction was reversed.

CERTIORARI to a justice of the peace. Complaint was made on oath to the justice of the peace that Warren is a disorderly person within the intent and meaning of chapter eighty-six, section fourteen of the Session Laws of 1855, and the Revised Statutes; for, that Warren, on the 12th day of December, 1856, and on divers other days before and since that date, in, &c., did and does keep a bawdy-house, or house for the resort of prostitutes, drunkards, tipplers, gamesters and other disorderly persons, and did make a noise and disturbance of the public peace, and did quarrel

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in view from a public place or street, to wit, at, &c. The justice issued his warrant, reciting in it the complaint. The defendant was arrested and brought before the justice, and pleaded not guilty. The cause was adjourned to the next day, at the instance of the defendant, when the defendant moved to be discharged upon the ground, among others, that the statute referred to is unconstitutional, as it creates a new court, and does not provide for trial by jury. The motion was denied. The defendant then asked to be tried by the next Court of Sessions, or before the justice, as he might elect. He offered to give bail for his appearance at the next Court of Sessions to be held in the county, and he objected to his being placed on trial except by a jury of twelve men; also objected to be tried except by a jury of six men. He objected to the jurisdiction of the justice. Bail was refused and the objections were overruled, and the justice proceeded to the trial. Numerous witnesses were examined. At the close of the evidence by the people, the defendant moved that he be discharged, provided he give sufficient securities for his good behavior for the space of one year, according to the Revised Statutes. The motion was denied, and the justice convicted the defendant of the offence charged, and adjudged and sentenced that he should be imprisoned in the common jail of Niagara county for the term of six months, and pay a fine of fifty dollars, and that he stand committed until the fine be paid.

A. P. Floyd, for plaintiff in error.

A. W. Brazee, for defendant in error.

By the Court, MARVIN, J.—The counsel for the plaintiff in error insists that the law under which the conviction was had is unconstitutional: First. Because it denies the right of trial by jury, in a case in which it has been heretofore used. Second. Because it establishes a new court, which

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does not proceed according to the course of the common law. Also, that the conviction is void, as the penalties imposed by the Revised Statutes and the act of 1855, are different.

Previous to examining the act of 1855, it will be proper to notice the Revised Statutes, "Of disorderly persons," in which it is declared, among other things, "that all keepers of bawdy-houses, or houses for the resort of prostitutes, drunkards, tipplers, gamesters or other disorderly persons," &c., "shall be deemed disorderly persons." (1 R. S., 638, § 1.) Upon a complaint on oath to a justice of the peace against any person, as being disorderly, the justice is required to issue his warrant, and to cause such person to be brought before him for examination. If it appear that such person is a disorderly person, the justice may require of him sufficient sureties for his good behavior for one year; and in default of such sureties, the justice is to make up, sign and file, in the county clerk's office, a record of the conviction of such offender, as a disorderly person, specifying generally the nature and circumstances of the offence, and by warrant, commit such offender to the common jail, there to remain until such sureties be found, or such offender be discharged according to law.

Two justices may discharge the prisoner from jail upon his giving the sureties required. If not discharged, the Court of General Sessions is to inquire into the circumstances, and may discharge such person from confinement, &c., or may, in its discretion, order such person to be kept in the common jail, for any time not exceeding six months, at hard labor, &c. The provisions of the Revised Statutes are taken mainly from an act passed February 9, 1788. (1 R. L., 114, § 1.) By that act the justice was authorized to commit such disorderly persons to the bridewell or house of correction, for any time not exceeding sixty days, or until the next General Sessions of the peace. The General Ses-

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sions had the power to detain and keep such disorderly person for any further time, not exceeding six months.

It is sure, that neither by the Revised Laws nor the Revised Statutes, was any trial by jury given in proceedings against disorderly persons. The whole power was, in the first instance, confided to a justice of the peace, and until the Revised Statutes, he was not authorized to take sureties, except as to persons who, for the most part, supported themselves by gaming. (1 *R. L.*, 154, § 9.)

It is proper to remark that I do not find "keepers of bawdy-houses" mentioned in the statutes relating to disorderly persons, prior to the Revised Statutes. It is clear that the trial by jury was not used prior to the constitution of 1821, or 1846, in cases relating to disorderly persons, as defined by the statute, and reserving the case of the "keepers of bawdy-houses," there can be no question that the legislature has the power to provide for the examination and trial of disorderly persons, without a jury.

Keeping a bawdy-house was, and is, an indictable offence at common law (1 *Russ. on Cr.*, 322), and the person, when indicted for this offence, has a right to be tried by a jury. May the legislature in revising the laws from time to time, or by new statutes, declare that persons doing certain acts, which acts by the common law or by statute are crimes, indictable and punishable as such, disorderly persons, and thus subject them to the summary proceedings and punishment before and by a justice of the peace, or any court, without a jury?

By the statute under which the justice acted, it is provided that, in addition to those persons described in section one, title five, chapter twenty, of the Revised Statutes, all riotous persons, or persons found quarreling or fighting in any alley, street or lane, or in any public place, street, lane or alley in said village, and any person who shall make any indecent exposure of his person in public view, and specifying many other acts, it is declared shall be deemed disor-

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derly persons, and that they be proceeded against and punished according to the provisions of the act. (*Laws of 1855*, 129, § 14.) By section sixteen, the justice is authorized to try and determine the complaint or charge, and upon conviction, he has the power and is authorized to punish such offender by fine not exceeding \$50, or by imprisonment in the county jail at hard labor or not, for a term not exceeding six months, or both such fine and imprisonment.

It will be noticed that the act does not mention "keepers of bawdy-houses, or houses for the resort of prostitutes, drunkards, tipplers and gamesters, or other disorderly persons." This is the language of the Revised Statutes. The act of 1855 introduces its specification with the language: "In addition to those persons described in section one, &c., of the Revised Statutes, all riotous persons, &c., shall be deemed disorderly persons, and may be proceeded against and punished according to the provisions of this act." *Quere.* Had the justice any power under the act to proceed against and punish any persons except such as are charged with the acts specified in this statute? Could he apply the provisions of this act, touching trial and punishment, to the cases specified only in the Revised Statutes? The act says, "When any person charged or complained against as a disorderly person *under the provisions of this act* shall be arrested" the justice may try. Are we to incorporate in the act all the cases specified in the Revised Statutes? I certainly have great doubt whether the language in this statute is sufficient to bring into the statute all the cases specified in the Revised Statutes as constituting disorderly persons, and thus subject them to a summary trial and punishment by the justice. If not, then the proceeding was under the provisions of the Revised Statutes, as to the charge of keeping a bawdy-house, or house for the resort of prostitutes, &c., and the justice had no right to try and punish the accused under the act of 1855, but he should have

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required sufficient sureties for his behavior for one year, or, in default, should have committed him to jail, pursuant to the provisions of the Revised Statutes. But I will waive this view of the case, and proceed to inquire whether Warren had the constitutional right to be tried by a jury. The principal charge, and of this he was convicted, was the keeping of a bawdy-house, or house for the resort of prostitutes, &c. As I have already stated, the keeping a bawdy-house was and is an indictable offence at common law, and any person tried for such an offence has always been tried by a jury. I do not find that this offence was ever classed with those constituting disorderly persons prior to the Revised Statutes. At the time the Revised Statutes were enacted, the constitutional provision touching trial by jury was the same as it now is. I am not aware that "keepers of bawdy-houses" have ever been proceeded against as disorderly persons under the Revised Statutes. Certainly, they have never been subjected to trial, fine and imprisonment by a justice of the peace without a jury. Had the legislature the power, when the Revised Statutes were enacted, to declare the keepers of bawdy-houses disorderly persons, and in that way subject them to imprisonment, as provided in the Revised Statutes, without a trial by jury? In my opinion, it had not such power. Keeping a bawdy-house was, at that time, a criminal offence, and indictable at common law as a nuisance. The legislature could not, by classing it with those acts which constituted disorderly persons, withdraw from the person charged with the offence the right which the constitution had secured to him of a trial by jury. As we have seen these were offences that might be summarily tried, and, under certain circumstances, without a jury, prior to the adoption of the constitution either of 1821 or 1846. Now, if the legislature can take any of the well known crimes which had been used theretofore to be tried by a jury, and by classing them with those cases or crimes which could be tried

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without a jury, it could entirely destroy the security provided in the constitution.

In *Wood v. City of Brooklyn* (14 Barb., 432), Justice Strong says: "This provision relates to classes, and of course includes the individual cases which they comprise. In no other way can constitutional enactments preserve that continued efficacy which is so essential for the public good. Whenever, therefore, a new case is added to a class it becomes subject to its rules." He applied these rules to a newly enacted penalty. He adds: "To allow the legislature to except from the operation of a constitutional provision by direct enactment, a matter clearly falling within its meaning, would sanction a fraud upon its organic law, and might, in the end, destroy its obligation." (*The People v. Berberick and Toynbee*, 11 How. Pr. R., 336; *The People v. Kennedy*, 2 Park. Cr. R., 312.) In the latter case Justice Parker says: "If the accused, in a trial of this grade, had the right to a trial by jury, in the constitutional sense of the word, when the constitution took effect, his right cannot be taken away by a subsequent act of the legislature. It is no answer to say that this offence did not exist at the time the constitution took effect, but has since been enacted by statute. If the offence be such that it could have been entitled to a trial by a jury, if enacted before the constitution was adopted, it cannot be deprived of the same right when enacted afterwards." These remarks were in cases where the crime was enacted since the constitution. They furnish the rule in such cases, viz., that where the legislature vote a new offence it is placed on the same footing as other previous offences of the same grade or class, and is equally governed by the constitution.

The legislature has, as we have seen, from time to time revised the statutes in relation to disorderly persons, and added new cases; and the legislature may, I have no doubt, continue to do so; and if the acts which shall be specified as constituting a disorderly person are of a similar charac-

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ter, grade or class with those previously constituting a disorderly person, the law may provide for proceeding against such persons without a jury, as a trial by jury has not, in such cases, been heretofore used. It will not be difficult, upon an examination of the laws relating to disorderly persons, to discover their general character. (4 Bl. Com., 169, So, also, the Revised Statutes, "Of disorderly persons," excepting as to the keepers of bawdy-houses, and houses for the resort of prostitutes, &c., jugglers, common showmen, mountebanks, &c., &c. If the keeping of a bawdy-house had not been an indictable offence it is quite probable that it might have been classed by the legislature with those cases constituting disorderly persons, and have been dealt with in the same manner. But the difficulty is that such offence was an indictable crime, and so triable by jury; and when a person is charged with this crime he has a right, by the constitution, to be tried by a jury. The accused offered to give bail, and the justice should have taken it. The accused was deprived of an important constitutional right, and the conviction and sentence must be reversed.

SUPREME COURT. Kings General Term, October, 1857. *S. B. Strong, Birdseye and Emott, Justices.*

THE PEOPLE v. JOHN BUSH.

On the trial of an indictment for burglary, it appeared that the building in question was owned by G., that there were several apartments in the house, all of which were occupied by tenants, the outer or hall door being common to all the occupants, and of these apartments, the one alleged to have been broken and entered, was occupied by W.; held, that the apartment alleged to have been broken and entered, was properly laid in the indictment, as the dwelling house of W.

Also, *Held*, that in the absence of positive evidence on the point, whether the outer door and the door of the room in which the prisoner was found were latched, at the time of the entry of the prisoner, it was competent to prove that these doors were generally kept closed or shut, it having been shown that both the doors were latched ten or fifteen minutes previous to the alleged entry.

Opening a street door which is only latched, is a sufficient breaking to constitute burglary at the common law; but simply lifting the latch of an outer door, though still a sufficient breaking to constitute burglary in an inferior degree, is not a breaking within the statute definition of burglary in the first degree.

The court has a right to direct a jury to reconsider their verdict before it has been recorded, and it is its duty to do so, if satisfied there has been a palpable mistake.

CERTIORARI to the Court of Sessions of Kings county, where the defendant was convicted of burglary in the second degree.

The indictment in this case charged the defendant with burglary in the second degree, in breaking and entering the dwelling-house of one John Wood, on the 18th of May, 1857, by breaking an outer door, and stealing one pair of pantaloons of the value of six dollars.

The evidence showed that John Wood and his family occupied apartments at 258 Myrtle-avenue, consisting of the basement, first floor and part of the third floor; that the rest of the house was occupied by other families, and that the outer or hall door was common to them all; that

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on the eighteenth day of May, in the daytime, Anne Wood, the wife of the said John Wood, came up from the basement, and found the defendant in her room with a pair of her husband's pantaloons on his arm; she asked him what he was doing with them, when, making no answer, he threw them down, and ran out of the front hall door; the pantaloons were worth about \$4.50; that the house belonged to Mr. Gascoyne, who did not reside in it.

The testimony on the part of the prosecution further showed, that on the day in question the hall door was not locked or fastened, and that the door leading from the hall into the room in which the defendant was found, was not locked or fastened either; that neither of the doors were broken or forced open, and that the tenants in the house were constantly going in and out the hall door, and that no person knew when or how the defendant got into the room. It was further proved, that there was no person in the room in which the defendant was found, except himself.

The counsel for the prosecution was suffered to prove that the hall door was generally closed or shut, and that the door of the room in which the prisoner was found was generally kept shut; to which evidence the prisoner's counsel excepted. It also appeared that strangers frequently obtained admittance to the house without the previous knowledge of the inmates.

The counsel for the defendant requested the court to charge the jury, first, that there was no evidence of a breaking and entry sufficient to warrant a conviction for burglary; second, that there was no evidence of a burglary at all; third, that there must be an actual or constructive breaking into the house; every entrance into a house by a trespasser is not a breaking, but that there must be evidence to show that the doors were fastened; fourth, that the prisoner could only be convicted of petit larceny.

The court declined so to charge the jury, and refused to charge other than as follows: That an actual breaking was

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necessary; that the smallest degree of force, such as lifting the latch, turning the handle, or pushing aside any obstacle which impeded the entrance of the party coupled with felonious intent, was sufficient; that it was for the jury to say, from the evidence, whether the prisoner was guilty or not; that if the jury had any reasonable doubt as to the guilt of the prisoner, he was entitled to the benefit of that doubt.

To which refusal the prisoner's counsel excepted.

The jury found the prisoner guilty of burglary in the third degree.

The court then directed the jury to retire, and directed the jury that under the testimony the prisoner could only be convicted of petit larceny, or burglary in the second degree, and that he could not be convicted of burglary in the third degree.

To all of which, the prisoner's counsel then and there excepted.

The jury, upon returning, said they found the prisoner guilty of burglary in the second degree.

The prisoner's counsel objected to the reception and entry of said verdict, but the court overruled the objection; to which the prisoner's counsel duly excepted.

James Troy, for the defendant.

I. The court erred in overruling the objection of the prisoner's counsel to the question, "Was the hall door generally closed or shut?" Such a question must have been based upon the assumption that if the door was generally shut, it was probably shut on the day in question, and if so shut, the prisoner probably opened it; a man cannot be convicted on a mere probability. (*The People v. Bodine*, *Whart. Cr. L.*, 283; *Bemis' Webster case*, 462-464.)

II. The court erred in overruling the objection of the prisoner's counsel to the question, was the door of the room in which the prisoner was found, generally kept shut. The

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question must have been based upon the same assumption as the other. (*Ib.*)

III. The court erred in refusing to charge the jury, that there was no evidence of a breaking sufficient to warrant a conviction for burglary. To warrant a conviction for burglary, it is necessary that there should be a breaking and entering into a dwelling-house with a felonious intent; the evidence showed that there was no breaking, and there being no evidence to show how the defendant came into the house, it was improperly left to the jury. (2 R. S., 668, §§ 10, 11.)

IV. The court erred in refusing to charge the jury, that there was no evidence at all of a burglary. The prisoner was caught in the commission of a larceny; the act of stealing was evidence of the intent to steal, but the commission of larceny is no evidence of a burglary, and a breaking cannot be presumed where it is proven that there was none. (*Whart. Cr. L.*, 268; *Hiler v. The State*, 4 *Blackf.*, 552; 1 *Phil. on Ev.*, 47.)

V. The court erred in refusing to charge the jury, that there must be an actual or constructive breaking into the house; every entrance into a house by a trespasser is not a breaking; but that there must be evidence to show that the doors were fastened. (*The State v. Wilson, Cox*, 439; *Whart. Cr. L.*, 512; 3 *Greenl. on Ev.*, 70-72.)

VI. The court erred in refusing to charge the jury, that the prisoner could only be convicted of petit larceny. In the absence of any proof of a burglary, and the only evidence being that the prisoner was caught stealing a pair of pantaloons worth \$4.50, the court was bound so to charge. (*Carpenter v. The People*, 4 *Scam.*, 197; *The People v. Jackson*, 3 *Hill*, 92; *Johnson v. The State*, 14 *Geo.*, 55.)

VII. The court erred in directing the jury to retire, after they rendered a verdict of burglary in the third degree. (*Whart. Cr. L.*, 923.)

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VIII. The court erred in instructing the jury that the prisoner could only be convicted of burglary in the second degree, or petit larceny, and that he could not be convicted of burglary in the third degree. If the defendant could have been convicted of burglary at all, it must have been burglary in the third degree, because it was proven that there was no person but himself in the room in which he was found; that room, for all the purposes of the indictment, was the dwelling-house of John Wood, and to convict the prisoner of burglary in the second degree, it should have been established that there was some human being therein when the prisoner entered, but the prisoner could not be convicted of burglary at all. (2 R. S., 668, §§ 10, 11; 1 *Russ. on Cr.*, 800, 803; 3 *Greenl. on Ev.*, 70.)

IX. The court erred in receiving and entering the verdict of burglary in the second degree. The jury had previously rendered a verdict of burglary in the third degree, and they could not render two verdicts, or convict the prisoner twice. It was also known to the court that one of the jurors was a German, and did not understand the verdict or proceedings, or what had transpired on the trial; and that the verdict of burglary in the second degree was, in point of fact, only the verdict of eleven jurors instead of twelve. (*Barb. C. L.*, 369.)

J. G. Schumaker (District Attorney), for the people.

By the Court, S. B. STRONG, P. J.—The defendant was convicted of the crime of burglary in the second degree, at a Court of Sessions in the county of Kings. Several objections were raised, by his counsel, to the proceedings during the trial, and have been repeated in this court, the more material of which I shall consider.

The indictment charges that the crime was committed in the dwelling-house of John Wood. He occupied two apartments in the house, and there were several tenanted by

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others. The outer or hall door was common to all the occupants. The rooms occupied by Wood constituted his dwelling-house within the requirements of the law. It has been decided that chambers in a college or inn of court, where each individual has a distinct property, are considered as separate mansions, though under the same roof and having a common entrance. (1 *Hale*, 556.)

Neither the hall door nor the door of the room in which the defendant had been discovered, was locked. If these doors were shut, he had simply unlatched them when he made his entrance. There was no one in the apartment when he entered it. The wife of the tenant testified that she had left the door latched when she left the room, about fifteen minutes before she returned and discovered the defendant, and that the hall door was also latched when she saw it, about ten minutes before; and she farther testified (after an objection had been taken and overruled) that both doors were generally kept closed. I am satisfied that this evidence was properly admitted. The proof that the doors had been so recently shut fairly led to the inference that they were closed at the time, which was strengthened by the general custom. Had no other proof but that of the general habit been introduced, I doubt whether that alone should have been received, and, if admissible, it would have been too uncertain to have warranted the conclusion that the doors were closed when the defendant reached them.

It is well settled that unlatching a door which is only latched is a sufficient breaking to constitute burglary at the common law. (1 *Hale*, 552; 2 *East's P. C.*, 487; 3 *Chit. Cr. L.*, 1093.) The rule has been recognized by the Supreme Court of this state. (*Curtis v. Hubbard*, 1 *Hill*, 238, *per Cowen, J.*)

The court had a right to direct the jury to reconsider their verdict before it had been recorded, and it was its duty to do so, if satisfied that there had been a palpable mistake. (1 *And.*, 104; *Alley*, 12; *Plowd.*, 211, *b.*; 2 *Hale*, 299, 300,

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310; *Hawk.*, b. 2, c. 47, § 11; *Bro. Abr.*, 7, "Jurors;" *Bac. Abr.*, "Verdict," G.)

I think, however, that the court erred in instructing the jury that this was a case of burglary in the second degree, or of petit larceny. Probably it was supposed to be included in that section of the statute which provides that "Every person who shall be convicted of breaking into any dwelling-house in the day-time, under such circumstances as would have constituted burglary in the first degree if committed in the night-time, shall be deemed guilty of burglary in the second degree." (2 *R. S.*, 668, § 11.) To constitute burglary in the first degree there must be forcibly bursting or breaking the wall or an outer door, window or shutter of a window, or the lock or bolt of such door, or the fastenings of such window or shutter, or breaking in any other manner, being armed with some dangerous weapon, or with the assistance and aid of one or more confederates, then actually present, or by unlocking an outer door by means of false keys or by picking the lock thereof. (*Id.*, 668, § 10.) In this case there was neither. The forcibly bursting or breaking an outer door means, in common parlance, more than simply lifting a latch. That the first subdivision of the tenth section must have designed something further is apparent from the third subdivision, which provides that unlocking an outer door by means of false keys, or picking the lock thereof, shall be a sufficient breaking to constitute burglary in the first degree. The provision would have been wholly unnecessary if simply unlatching the door would have been deemed bursting or breaking it within the meaning of a former part of the same section. Clearly there is no other statutory definition of burglary in the second degree which comprehends the crime perpetrated by the defendant, as proved on his trial.

For the error of the court in charging the jury that this was a case of burglary in the second degree, or petit larceny,

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and which led to an improper conviction, such conviction must be set aside, and there must be a new trial in the Court of General Sessions.

SUPREME COURT. Tompkins General Term, October, 1857. *Gray, Mason and Balcom*, Justices.

THE PEOPLE *v.* GEORGE LOOP.

In an indictment for robbery in the first degree (2 R. S., 677, § 55), the defendant was charged with having feloniously assaulted J. D., on, &c., at, &c., and then and there feloniously putting him in fear and danger of his life, and then and there feloniously and violently stealing, taking and carrying away from his person and against his will, certain money of the said J. D., to wit, current bank bills of the value of fifteen dollars, and silver coin of the value of three dollars, of the goods and chattels of the said J. D., against, &c., and it was held sufficient, without setting forth the number and denomination of the bank bills and the amount secured thereby and remaining unsatisfied thereon, or the number and description of the pieces of silver coin.

CERTIORARI to the Chemung Oyer and Terminer, where the defendant was convicted on an indictment, charging him with feloniously assaulting John Dickinson, on the 1st day of October, 1854, at Elmira, and then and there feloniously putting him in fear and danger of his life, and then and there feloniously and violently stealing, taking and carrying away from his person and against his will, "certain money of the said John Dickinson, to wit: current bank bills of the value of fifteen dollars, silver coin of the value of three dollars, of the goods and chattels of the said John Dickinson, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York, their laws and dignity."

The defendant's counsel claimed that the verdict was not warranted by the evidence. He also insisted that the indictment was defective and insufficient, because it did not

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show the number and denomination of the bank bills that were stolen from Dickinson, or the amount secured thereby and remaining unsatisfied thereon, or the number, size and description of the pieces of silver coin that were stolen from him.

S. B. Tomlinson (District Attorney), for the people.

Erastus P. Hart, for the defendant.

By the Court, BALCOM, J.—The ruling of the Oyer and Terminer, upon the offer of the district attorney, to give certain evidence by the witness, Rutter, was too plainly correct to require any examination by this court. And we could not say that the verdict of the jury was not warranted by the evidence in the case, if a motion to set it aside, as against evidence, was properly before this court.

The definition of robbery at common law is, a felonious taking of money or goods, of any value, from the person of another, or in his presence against his will, by force and violence, or putting him in fear. (4 *Bl. Com.*, 243; *Barb. Cr. Tr.*, 134; *Whart. Cr. L.*, 540.) The legislature has enacted that, "Every person who shall be convicted of feloniously taking the personal property of another from his person or in his presence, and against his will, by violence to his person, or by putting such person in fear of some immediate injury to his person, shall be adjudged guilty of robbery in the first degree." (2 *R. S.*, 677, § 55.)

The indictment in this case charges the defendant with the crime of robbery in the first degree, and it contains all the necessary averments to make it good under the statute. If it were an indictment for larceny only, perhaps it would be insufficient, by reason of the omission of its framers to describe and state in it the number of bank bills and pieces of silver coin that were taken from Dickinson. (*Low v. The People*, 2 *Park. Cr. R.*, 37; 11 *Cush.*, 142.) But in cases

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of robbery, the value and description of the property stolen are not very material matters; the gist of the offence being the force and terror. And it has been held, "where a man was knocked down and his pocket rifled, but the robbers found nothing except a slip of paper containing a memorandum, an indictment for robbing him of the paper was held to be maintainable." (*Rosc. Cr. Ev.*, 393; *Barb. Cr. Tr.*, 134.) Enough is set out in the indictment against the defendant, to show that he took personal property of value from Dickinson, to wit, bank bills and specie, and that is sufficient.

If the defendant should be indicted for simple larceny, in stealing the same bills and silver coin from Dickinson, his conviction on this indictment would be a bar to the charge of larceny; and parol evidence of the kind of bills and coin proved to have been taken by him, on his trial upon this indictment, would be admissible to establish the identity of the offences. (*The People v. McGowan*, 17 *Wend.*, 386.)

No injustice was done to the defendant on his trial. His conviction should be affirmed, and the Chemung Oyer and Terminer should be advised to pronounce judgment.

Proceedings affirmed.

SUPREME COURT. Onondaga General Term, October, 1857.
Hubbard, Pratt, Bacon and W. F. Allen, Justices.

THE PEOPLE *v.* MARY SHEA.

A conviction for misdemeanor, before a Court of Special Sessions, cannot be reviewed on a return to a writ of *habeas corpus*.

Where it appears, by a return to a writ of *habeas corpus*, that the prisoner in whose behalf it was sued out is detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, it is the duty of the officer before whom the writ is returned forthwith to remand the prisoner.

Where a statute prohibits an act which is not criminal at common law, and imposes a civil penalty for its commission, the act is not indictable; but if, at the time of the enacting of the statute, it was already prohibited by a former statute, and the statute imposing the penalty contains provisions showing that the legislature did not intend that the civil penalty should constitute the only punishment, it may, in addition to the penalty, be also punished as a misdemeanor.

Selling liquor without a license is an indictable offence, and punishable as a misdemeanor, under the act of April 16, 1857, entitled "An act to suppress intemperance, and to regulate the sale of intoxicating liquors."

CERTIORARI to the county judge of Onondaga county.
The facts are sufficiently stated in the opinion of the court.

Henry S. Fuller (District Attorney), for the people.

John C. Hunt, for the defendant.

By the Court, PRATT, J.—The defendant was convicted under the new license law, before a Court of Special Sessions, for selling liquor without a license, and sentenced to pay a fine, or in default thereof to be imprisoned in the county jail. On application in behalf of the prisoner, the county judge of Onondaga county issued a writ of *habeas corpus*, and upon the prisoner being brought before him, it was insisted on her behalf that the offence was not a misdemeanor under the statute; but the county judge over-

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ruled the objection, and remanded her to the custody of the jailor.

This *certiorari* was sued out to review his decision.

Assuming the decision of the Court of Special Sessions to be erroneous, it could not be reviewed upon the return to a *habeas corpus*. By the statute of the state, persons committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such judgment or decree, are not entitled to prosecute that writ; and if it appears, upon the return of such writ, that the person is thus committed or detained, the officer suing the writ is directed forthwith to remand him. A court of Special Sessions is clearly a court of criminal jurisdiction, and the commitment was by virtue of a final judgment of that court. The county judge was, therefore, for this reason, right in remanding the prisoner. (2 R. S., 563, § 22; *id.*, 567, § 40.)

But as this is an important question under the new excise law, and one that will frequently arise before subordinate tribunals; we deem it expedient to examine it upon the merits, in order that there may be an early settlement of the question.

It is well settled that where an act is prohibited by statute which is not criminal at common law, and a penalty is imposed in the same statute declaring such prohibition, the act is not indictable. This principle was distinctly recognized in the case of *The People v. Stevens* (12 Wend., 347). It is based upon the assumption that the legislature, having fixed the penalty at the same time of prohibiting the act, designed that there should be no other punishment; but where the act was criminal at common law, or already prohibited by a former statute, the imposition of a civil penalty would not take away the power to punish by indictment. So, when the statute itself contains any provisions showing that the legislature did not intend that the civil penalty

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should constitute the only punishment, the remedy by indictment would not be taken away.

Hence, if a statute direct that the prosecution may proceed in a certain way or otherwise, as if a statute give a recovery by action of debt, bill, plaint or information, or otherwise, it authorizes a proceeding by indictment. (*Arch. Cr. Pl.*, 1, 2; 2 *Hawk.*, ch. 25, § 4.)

In fine, it is simply a question of legislative intent. In looking, therefore, at the statute in question, in its whole scope and bearing, and in connection with previous legislation upon the same subject, can we infer an intention on the part of the legislature to confine the remedy for a violation of its provisions in selling without license to the civil penalty therein imposed, or is the intention manifest that the offender shall also be punished by indictment? Upon a careful examination of the statute, it seems to me that the conclusion is irresistible that the latter was the intention of the legislature.

First. This act, in its leading characteristics, is very similar to the old excise laws, both in its prohibitions and its penalties.

Under those laws, the selling in quantities less than five gallons was prohibited by penalties in substantially the same form as in the present act. By an independent section of that act, all offences against provisions were declared misdemeanors, and this court, in the cases of *The People v. Stevens* (13 *Wend.*, 341), and *The People v. Brown* (16 *id.*, 561), held that selling the prohibited quantities without license were offences against the provisions of the act, and therefore misdemeanors, and indictable.

If, therefore, selling without license constituted offences against the provisions of that act, it is difficult to find any good reason why similar violations of the present statute should not also be deemed offences against its provisions. And, although such offences are not, by this statute, declared in express terms to be misdemeanors, yet the whole scope

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of the statute shows that they were designed to be indictable.

By section sixteen it is made the duty of certain officers, therein enumerated, to arrest "all persons found actually engaged in the commission of any offence in violation of this act, and forthwith to carry such persons before any magistrate," &c., who is to try them or hold them to bail as for any other misdemeanor triable by a Court of Special Sessions.

In a subsequent part of the same section it is made the duty of "the magistrate to entertain any complaints of a violation of this act, made by any person under oath, and forthwith to issue a warrant and cause such offender to be brought before him to comply with the provisions of this section," &c. Here, the term used is "any complaint of a violation of this act," and upon such complaint being made a warrant is to be issued. The term "offence," which the counsel for the prisoner insists only means those violations of the law declared in the act itself to be misdemeanors, is not used, but the more general term "violations of the act," and the proceedings directed to be taken by the magistrate are such as are applicable to cases of misdemeanors only.

So, by section twenty-ninth, it is made "the duty of courts to instruct grand jurors to inquire into all offences against the provisions of this act, and to present all offenders under this act."

These provisions show that the legislature deemed all offences against the provisions of the act misdemeanors as plainly as if they had in express terms declared them such.

The act of selling without license is called, in those sections of the statute imposing the penalties, offences.

By section thirteenth it is declared that whoever shall sell any strong or spiritous liquors or wines, in quantities less, &c., shall forfeit \$50 for each offence. By section fourteenth, whoever shall sell to be drunk in his house, &c., shall forfeit \$50 for each offence. In fine, all through the statute, violations of the provisions of the act are termed offences. And

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it is a primary rule for the interpretation of statutes, that when the same term or expression is used in different parts of the same statute, it shall be deemed to have the same meaning, unless the contrary very plainly appears to have been the intention of the legislature. (*Smith on Stat.*, 673; *James v. Dubois*, 1 *Har.*, 282.)

The term offences against the act, in its ordinary significations, would embrace any violation of the act. The general statutory definition, as given in the Revised Statutes, which is invoked by the prisoner's counsel in aid of the construction insisted upon by him, throws but little light upon the point. By that statute the term "offence," when used in a statute, shall be construed to mean any offence for which any criminal punishment may by law be inflicted. Now, the question in controversy is, whether this particular violation of the act is punishable criminally. If so, the term offence applied to it would be in strict accordance with the statutory definition of the term. ,

Again, as it already appears, the act itself calls this violation an offence. Now, if the statutory definition of that term is of any force whatever to settle the question under examination, it is against the construction contended for on behalf of the prisoner. For the term, when used in any statute, is to be construed to mean any offence for which any criminal punishment may be inflicted. (2 *R. S.*, 886, § 37.)

Upon the whole, I am satisfied that it was not the design of the legislature to limit the punishment for the violation of the act in question to the penalty imposed therein, but to authorize a proceeding by complaint before a magistrate, or by indictment.

Proceedings affirmed.

SUPREME COURT. At Chambers. New-York, November 23, 1857.
Before *Roosevelt*, Justice.

THE PEOPLE *v.* JOHN B. HOLMES.

A stay of proceedings on a conviction in a criminal case till a decision on writ of error, is a matter of discretion.

THE prisoner had been convicted of forgery, and sentenced to imprisonment in the state prison for the term of fifteen years and six months. Exceptions having been taken, his counsel applied to Mr. Justice Roosevelt for a stay of proceedings on the conviction till a decision should be had on a writ of error.

J. B. Phillips, for the prisoner.

A. Oakley Hall (District Attorney), for the people.

ROOSEVELT, J.—Holmes, it appears, was convicted and sentenced in the General Sessions for the crime of forging his wife's name to a deed of real estate. He now applies, on various grounds, for a writ of error to bring the judgment into the Supreme Court for review, and, in the mean time, to stay all proceedings. Writs of error in such cases are declared by the statute to be writs of right, and to issue, of course; but the same statute also declares that they shall not stay or delay the execution of the judgment, or of the sentence thereon, unless allowed by a justice of the Supreme Court, with an express direction to that effect.

It will thus be seen that the prisoner has a strict right to the review, but not to the stay. The stay is a matter of discretion, to be exercised only on good cause shown. Of what avail, it may be said, will be a review after imprisonment has been suffered? On the other hand, of what avail, it may be asked, would be criminal trials, if in every case

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the execution of the sentence were to be delayed by review at the mere option of the criminal? No man sentenced either to death or imprisonment would voluntarily submit. Writs of error would be universal. Promptitude and certainty, so essential to the punishment of crime, would be entirely defeated, and the whole register of criminal administration would soon become paralyzed.

The objections made to the present indictment are of a purely technical character ; they in no degree affect the substance of the crime charged.

The prisoner executed a deed of real estate. Not being able to procure the genuine signature of his wife, so as to pass her claim of dower, he forged a signature for her, and superadded the crime of personation, to impose, first on the commissioner who took the sham wife's acknowledgment, and then upon the purchaser, who innocently accepted the sham wife's deed.

Does such a case address itself to the favorable consideration of a judge to whom the law has confided the exercise of a sound discretion? I think not; and must, therefore, deny the application, and leave the sentence to take its course.

SUPREME COURT. New-York General Term, November, 1857:
Mitchell, Clerke and Peabody, Justices.

**ELIJAH HUNT, plaintiff in error, v. THE PEOPLE, defendants
 in error.**

Where, on the trial of an indictment for manslaughter, alleged to have been committed in causing death by effecting an abortion, it was shown that the defendant had said to A. A., who was on her way to see Mrs. L., then stated to be pregnant, that he would effect an abortion upon Mrs. L. for \$25, and it appeared that A. A. went immediately to the residence of Mrs. L.; held, that it was not erroneous to permit the prosecution to prove the fact that a conversation on the subject took place between A. A. and Mrs. L., without stating the details of the conversation, though the defendant was not present. And inasmuch as it further appeared that Mrs. L. returned with A. A. immediately to the place of defendant, where the defendant operated on Mrs. L. and produced the abortion, and it appeared satisfactorily that the defendant had intended that what he said should be communicated by A. A. to Mrs. L., though it was not authorized in express terms; held, further, that it would have been competent to prove that A. A. communicated to Mrs. L. what the defendant had said on the subject, and to give the details of such communication. *Per CLERKE, J.*

A witness, called and examined on behalf of the defendant, having testified, without objection from the district attorney, to a conversation she had with the deceased Mrs. L. a day or two before her death, during which the deceased informed the witness that her illness was caused by miscarriage, and that the miscarriage had been brought about by natural causes; held, that though such evidence would have been inadmissible if objected to, yet, having been received, it was competent for the district attorney to meet it by proof that the deceased was out of her mind when she made such declarations.

The declarations of a party as to the state of his health are, under some circumstances, admissible in evidence in his own behalf, but they are confined to his condition at the moment of speaking, and cannot be extended to past matters.

Where, on the trial of an indictment, evidence had been improperly received and excepted to, and it appeared that the jury was subsequently instructed by the court in its charge to disregard such evidence, it was held that the erroneous decision in receiving the evidence was no ground for reversing the judgment.

Form of an indictment for manslaughter in the second degree, for causing death by effecting an abortion, with a count for a misdemeanor in using an instrument with intent to procure a miscarriage.

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ERROR to the Court of General Sessions of New-York. The plaintiff in error was indicted in the Court of General Sessions for manslaughter in the second degree, under part four, chapter one, title two, article one, section nine of the Revised Statutes, with a count for a misdemeanor under section two, article nine, title three of the same chapter.

The indictment was in the following form :

City and County of New-York, ss :

The jurors of the people of the State of New-York, in and for the body of the city and county of New-York, upon their oath, present: That Elijah Hunt, late of the tenth ward of the city of New-York, in the county of New-York aforesaid, on the first day of January, in the year of our Lord one thousand eight hundred and fifty-seven, at the ward, city and county aforesaid, in and upon one Hannah Lawson, she, the said Hannah Lawson, being then and there pregnant with a quick child, feloniously and willfully did make an assault, and that he, the said Elijah Hunt, did then and there feloniously and willfully use on, in and upon the womb and body of the said Hannah Lawson, the mother of the said quick child, a certain instrument, to wit, a piece of steel wire, of the length of six inches, with the intent thereby to then and there destroy the foetal life of the said quick child, and the same not being necessary to preserve the life of her, the said Hannah Lawson, the mother of the said quick child. And the jurors aforesaid, upon their oath aforesaid, do further present: That the said Hannah Lawson, by means of the said use of the said instrument, willfully and feloniously aforesaid, upon her womb, by the said Elijah Hunt, became mortally wounded and distempered, and of the said mortal wounding and distempering languished from the day first aforesaid until the twenty-first day of the same month aforesaid, in the same year aforesaid, when she, the said Hannah Lawson, of the said mortal wounding and distempering, died. And so the jurors aforesaid, upon their oath aforesaid, do

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say that he, the said Elijah Hunt, willfully and feloniously, by the means and in the manner aforesaid, her, the said Hannah Lawson, on the day and in the year last aforesaid, did kill and slay, against the form of the statute in such case made and provided, and against the peace of the people and their dignity.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present: That, on the day and in the year first aforesaid, he, the said Elijah Hunt, willfully and maliciously did use a certain instrument of steel wire of the length of six inches in and upon the womb of her, the said Hannah Lawson, at the ward, city and county aforesaid, she, the said Hannah Lawson, being then and there big and pregnant, within her said womb, with a child, with the intent thereby to cause the said child of her, the said Hannah, to be forcibly delivered from her said womb, before the natural time of delivery thereof, and to cause her, the said Hannah Lawson, thereupon to miscarry of the said child from the womb, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

A. OAKLEY HALL,
District Attorney.

The defendant pleaded not guilty, and the issue so joined came on to be tried, on the 22d day of April, 1857, before James M. Smith, Jr., Recorder, and a jury.

During the trial, *John Bigelow*, a physician, was called as a witness by the prosecution, duly sworn and testified: That he knew Mrs. Lawson, the deceased, in her lifetime; that he commenced attending her professionally on the 17th day of January, 1857, and that she died on the twentieth day of that month.

During his examination, as a witness, he was asked, by the district attorney, whether he, the witness, when he first

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called to attend her professionally, as above stated, found any medicine with her?

The counsel for the prisoner objected to this question, on the ground that there was no evidence showing or tending to show any agency of the defendant in giving to the said Mrs. Lawson the medicine alluded to by the said question, or in procuring it to be given to her. The court overruled the objection and allowed the question to be answered, saying that it could not foresee what would be the testimony as to whether this was given to her by the defendant; to which said decision of the court the counsel for the prisoner excepted.

The witness thereupon testified: That upon that occasion he found with the said Mrs. Lawson medicine known as the oil of rue.

The district attorney thereupon asked the witness to state the effects of the medicine in reference to producing abortion; to which question the counsel for the defendant objected.

The court overruled the objection and allowed the question to be answered, to which decision the counsel for the defendant duly excepted.

The district attorney asked the witness to state what the bottle containing the medicine in question was marked.

The counsel for the defendant objected to this question. The court overruled the objection and allowed the question to be answered, to which decision the counsel for the defendant duly excepted.

There was not, during the trial, any evidence showing or tending to show that the defendant gave the medicine, oil of rue, or caused it to be given to her, and the court instructed the jury in its charge to disregard it.

During the trial, one Mrs. Ann Armitage was introduced as a witness on behalf of the prosecution, who testified: That she knew the defendant, Hunt; that his occupation was that of curl and wig maker; that he had in his employ,

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at his place of business, 115 Bowery, one Ann Dalton; that she, the witness, about two weeks before the holidays, in December, 1856, called at defendant's said place of business; that she stated to Ann Dalton, in defendant, Hunt's, presence, that she was going to see a friend of hers who was in trouble; that Ann Dalton asked her what trouble, to which she replied that her friend was pregnant; that defendant, Hunt, then said that he would relieve her friend of her difficulty for \$25.

The district attorney subsequently proposed to show by this witness, that she detailed this conversation to the deceased Mrs. Lawson; that, in consequence, Mrs. Lawson and the witness returned immediately to the place of defendant, and that defendant operated on the deceased with an iron wire, which was produced.

The counsel for the prisoner objected to the fact of the conversation between the deceased Mrs. Lawson and the witness, in the absence of the defendant, Hunt. The court overruled the objection, and allowed the fact of such conversation, but not its details, to be given; to which decision the counsel for the defendant excepted.

In the course of the trial the said *Ann Dalton* was called as a witness by the defence and duly sworn. Among other things, she testified, without objection by the district attorney, to a conversation she had with the deceased in January, and but a day or two before her death, during which the deceased informed this witness that her illness was caused by a miscarriage, and that the miscarriage had been brought about by natural causes. The witness stated that at the time of the conversation she was alone in the room with the deceased.

Subsequently, the witness *Dr. Bigelow* was recalled by the prosecution and stated that it was during one of his professional visits to deceased that the witness Ann Dalton saw her as above stated; that he, the witness, was out of the room at the time.

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The district attorney asked the witness what, in his professional opinion, at this time, was the state of mind of the deceased?

The counsel for the defendant objected to the question; the court overruled the objection and allowed the question to be answered; to which decision the counsel for the defendant also excepted.

The witness then answered that the deceased at this time was out of her mind.

The jury found the defendant guilty of the felony charged, and he was sentenced to imprisonment in the state prison, at hard labor, for the term of four years; whereupon the cause was removed into the supreme court by writ of error. The cause was argued by

Henry L. Clinton, for the plaintiff in error.

A. J. Vanderpoel, for the people.

CLERKE, J.—The defendant was indicted at a Court of General Sessions, for effecting an abortion upon one Hannah Lawson, by which she became mortally wounded, and, in consequence, languished and died.

It was proved at the trial, by Ann Armitage, "that she went to defendant's place of business; that she stated to one Ann Dalton, in the defendant's presence, that she was going to see a friend of her's who was in trouble; that Dalton asked her what trouble, to which she replied that her friend was pregnant; that defendant Hunt then said that 'he would relieve her friend of her difficulty for twenty-five dollars.'" The district attorney subsequently proposed to show by this witness that she detailed the conversation to the deceased Mrs. Lawson; that, in consequence, Mrs. Lawson and the witness returned immediately to the place of defendant, and that defendant operated on the deceased with an iron wire, which was produced.

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The counsel for the prisoner objected to the fact of the conversation between the deceased Mrs. Lawson and the witness, in the absence of the defendant Hunt. The court overruled the objection, and allowed the fact of such conversation, but not its details, to be given; to this decision the counsel for the prisoner objected.

If the judge meant that the witness should testify merely that a conversation had taken place between Lawson and the witness, we cannot see on what grounds the counsel could have presented even the color of an objection, except that, as the conversation between her and Hunt had been previously detailed, that the effect produced on the jury was the same as if she was allowed to repeat it, as she had afterwards communicated it to Mrs. Lawson. But, we are strongly inclined to think, even if the judge had allowed this, there would have been no error. The conversation referred to in the objection was merely a communication by the witness to Mrs. Lawson that Hunt said "that he would relieve her of her difficulty for twenty-five dollars." There is no proof, to be sure, that Hunt authorized the witness, in positive terms, to give this information to Mrs. Lawson; but he declared, in the presence of Mrs. Armitage, her friend, who was describing "her trouble," that he would relieve her for a certain compensation, and he certainly imposed no silence on Mrs. Armitage in relation to the subject, but, on the contrary, by the terms of the proposal itself, he must necessarily have designed that it should be conveyed to the person who was to accept or reject it.

But, although the conversation (if that can be called a conversation, which, in fact, was only the repetition of what the defendant had said) was perfectly admissible, yet it was, practically, of very little importance in the present case whether it was admitted or not. The offence was clearly proven, and could have been as clearly proved with or without any portion of the conversation first detailed or afterwards repeated. The same witness proved

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that Mrs. Lawson "went to the place of defendant, and that defendant operated on the deceased with an iron wire," which was produced at the trial. This was, of itself, abundantly sufficient for the jury, without the necessity of referring to anything that had been previously said or done.

The next objection urged before us by defendant's counsel is, that Ann Dalton, who was called on behalf of the defendant, testified, without objection by the district attorney, to a conversation she had with the deceased a day or two before her death; during which the deceased informed her that her illness was caused by a miscarriage, and that the miscarriage had been brought on by natural causes. This was received for the benefit of the defendant as the declaration of the party alleged to have been injured; the district attorney not insisting upon the right to have it shown that at the time she made the declaration she thought she could not recover. He had a right to dispense with this if he had a right to insist upon it, and his dispensing with it was nothing more than a consent that the declaration should go to the jury for what it was worth, with the same effect as if it was shown that it was the declaration of a person conscious of approaching death. Had not the district attorney, on the other hand, the right to rebut the effect of this testimony, by showing the state of mind of the deceased at the time she made the declaration? The defendant's counsel insists that, although the declaration was introduced by himself, for the benefit of his client, still as it was error to receive the declaration of a third party, without showing that she believed she was dying, it is a double error to attempt any refutation of the declaration, and that the whole should be expunged. This was not collateral testimony; it was direct; it tended to show whether the operation produced the death of Mrs. Lawson, and it was one of the issues in the cause. Even if it were improper as hearsay testimony, without showing that the declarant believed that she was about to die, yet, as the district attor-

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ney, by withholding his objection, recognized it as proper evidence, and as the defence introduced it as proper evidence, the verdict cannot be disturbed on the ground that the declaration was hearsay evidence, and although it went to the jury the disproof of it was not admissible. But it is very doubtful, even if the district attorney had objected to the declaration on the ground to which I have referred, whether the objection could have been sustained. The declaration did not relate to any previous occurrence to which Mrs. Lawson could testify as a witness at the trial; but she spoke of the state of her health and the nature of her distemper. The representations of deceased persons as to the state of their health, where relevant to the issue, have been frequently received, without proving that they were made under the belief of approaching death. (*Aveson v. Lord Kinnaird*, 6 East, 188, 198, 1 Phil. Ev., 233.) The judges held the evidence unexceptionable on general principles, as the account of the deceased person concerning her existing state of health, which was the subject of inquiry. So, inquiries by medical men, with the answers to those inquiries, are evidence of the state of health of the patient at the time. What a man has said of himself to his surgeon is evidence in an action of assault and battery to show what he has suffered in consequence of the assault. In an action for breach of warranty of the soundness of a slave, his declarations, that he had a pain in his side, by which the disease was detected, were held to be admissible. (*Grey v. Young*, 4 McCord, 38.) These and several other cases which could be quoted, stand on the doctrine of *res gesta*. In fact, it is an elementary principle in the law of evidence that the representations of a sick person, of the nature, symptoms and effects of the malady under which he is laboring at the time, are received as original evidence. They are not comprised within the definition of hearsay evidence. (1 Greenl. Ev., § 102.)

The judgment of the General Sessions should be affirmed.

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PEABODY, J.—I do not know that I should agree with my learned brother that the statement of deceased was admissible as evidence, if it had been objected to. I think that I should not, but should consider it inadmissible. The statements of persons as to their feelings or health are, as is shown by the cases cited by him, often admitted as evidence to show the state of health at the time of speaking, many of the symptoms and *indicia* of which can only be ascertained by communication from the patient. Such, for instance, are the sensations at the moment of the inquiry, as a pain of a peculiar kind, or in one or another part of the sufferer, as to which the statements of the party, like his actions and movements in reference to it, are deemed to be somewhat involuntary, and therefore truthful, and for this reason, as well as from the necessity of the case, are admitted as evidence of the facts stated. But it is only as to the then present state of the party or his feelings that that kind of evidence is admissible. In this case the deceased undertook to state a fact occurring sometime before, and that not even a matter of her own personal experience which would in its own nature necessarily be known only to herself, but to tell what, occurring at a previous time, had produced the then present state of her health; and, as to this matter, I think that her declarations were not admissible on any ground, unless made *in extremis*, which this was not.

I concur with him, however, in the result to which he has arrived.

MITCHELL, J.—I am of opinion that when one party has introduced improper evidence, the court may allow his opponent to meet it, either by contrary or explanatory proof, or other matter of fact, or by denying its legality; especially if the party who introduced the proof does not withdraw it. The members of the court do not disagree as to the rule of law governing the admission of declarations of a party as to the state of his health: that they are confined to his condi-

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tion at the moment of speaking, and cannot be extended to past matters. As to the former, they are presumed to be necessarily without design, and as truthful as the involuntary motion of the hand to the aching head or the painful side, or the gentle sigh, the heavy groan or the falling tear. The exclamation of the Shunamite boy (a), when, overcome with the heat in the harvest field, he said to his father, "My head, my head," and was carried home and died, was as satisfactory evidence of his suffering as his own testimony in court would have been.

Judgment affirmed.

SUPREME COURT. Erie General Term, November, 1857. *Davis, Greene and Marvin, Justices.*

THE PEOPLE v. ANDREW J. NICHOLS.

Thirty-four tons of pig iron, in bars, each weighing about one hundred pounds, were intrusted to a common carrier, to transport on the canal from Albany to Buffalo. On the passage, the carrier stopped his boat in the night, and, with the assistance of one of his hands, and with a felonious intent, put off from the boat one hundred bars of the iron, and then proceeded and delivered the remainder of the iron at Buffalo; held, that the facts did not constitute larceny at common law, but that the carrier was guilty of embezzlement, under 2 *Revised Statutes* (p. 679, § 62).

Held, also, that a trial and acquittal for larceny, on these facts, was no bar to a subsequent conviction for embezzlement on the same facts.

THE defendant was indicted in November, 1856, for the larceny of pig iron. He was tried in the Oyer and Terminer, in December, 1856, and acquitted. He was immediately indicted for embezzling and converting to his own use, without the consent of the owner, certain pig iron. Also a count

(a) 2 Kings, ch. iv., v. 19.

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for secreting and making way with, with intent then and there to embezzle and convert to his own use, the said personal property. The counts in this indictment allege the delivery of the iron to the defendant, as a carrier, to be carried from Albany to Buffalo for hire.

The defendant plead: First. Not guilty; Second. The previous acquittal of the offence charged; Third. The previous acquittal, setting forth the previous indictment, and asserting that the acts and offences charged in the two indictments were the same, and that the same evidence which would support the one would support the other. The people took issue upon the second plea, viz., that the offences charged were the same. To the third plea, the people demurred, and the defendant joined in the demurrer. The court overruled the demurrer, and the issues were tried, and the defendant was convicted.

From the bill of exceptions it appears that George W. Brown contracted with the defendant for the transportation of a boat load of iron from Albany to Buffalo, at the compensation of nine shillings a ton. About thirty-four tons of pig iron, in bars, each weighing about one hundred pounds, were put upon the boat at Albany. On the passage, the defendant stopped his boat, and, in the night of the 10th of November, 1856, with the assistance of one of his boatmen, put off from the boat about one hundred bars of the iron, being about five tons. The remainder of the iron was taken by the defendant to Buffalo, and there properly delivered. Evidence was given tending to show that the taking was with a felonious intent. The counsel for the defendant moved he be discharged, on the ground that the offence proved was larceny, and not embezzlement, as charged in the indictment. The motion was denied, and the prisoner excepted. The court charged that the crime was embezzlement, if the jury believed the witnesses, and the prisoner excepted. The court refused to charge, as requested, that

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the evidence did not establish the crime of embezzlement, and the prisoner excepted. The verdict was "guilty."

William Doraheimer and Benjamin Austin, for the prisoner.

A. Sawin (District Attorney), for the people.

By the Court, MARVIN, J.—If, from the evidence upon the trial, a jury would have been authorized to convict the prisoner of larceny, the conviction upon the present indictment is erroneous. In other words, if the prisoner could have been convicted upon the first trial, his acquittal upon that trial was a good bar to the second indictment. The question then is, do the facts show a larceny or embezzlement? Larceny is defined to be the felonious taking and carrying away of the personal goods of another (4 *Bl. Com.*, 229), or the wrongful and fraudulent taking and carrying away, by one person, of the mere personal goods of another, from any place, with a felonious intent to convert them to the taker's own use, and make them his own property, without the consent of the owner. (2 *East's P. C.*, 553; 2 *Russ. on Cr.*, 2.)

From these definitions it is seen that there must be a taking, and this implies that the consent of the owner of the goods is wanting. If the owner of the goods deliver them to the offender upon any trust, a violation of the trust will not afford any ground of a larceny. It was early established as law that if a man deliver goods to a carrier to convey to a certain place and he carry them away it is no felony (larceny). (*East Pl. C.*, ch. 16, § 115.) It was also established at an early day that if the carrier have a bale or trunk delivered to him, and he break the bale or trunk and carry away the goods with the intent to steal them, he will be guilty of larceny.

This distinction proceeded upon the ground that by breaking the package, bale or trunk, the delivery of the owner

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and the trust ceased, and the taking of the goods from the violated package, &c., was, if felonious, a taking within the definition of the crime of larceny. Many cases have been decided upon this distinction, and with little difficulty. (1 *Hale Pl. C.*, 504, 505; *Rosc. Cr. Ev.*, 598; *Russ. on Cr.*, 56, *et seq.*) A few cases have arisen, however, in which there have been difficulties in determining the precise character of the offence, under the distinction above stated. We have been referred to some of them. The prisoner's counsel rely very much upon the case of *Rez v. Howard*, 7 *C. & P.*, 325.) The prisoner was employed to carry staves ashore in his boat. The prisoner never landed two of the staves. He concealed them in the bottom of his boat under some nets. "One of the staves which he landed he carried to his mother's house." He was indicted for stealing three staves. Justice Paterson decided that the prisoner was a bailee of the staves. That point having been made, he then says: "If the prisoner had not taken the staves out of the boat, the mere non-delivery of them would not have amounted to larceny; but the prisoner's separating one of the articles from the rest, and taking it to a place different from that of its destination, was, if he did it with intent to appropriate it to his own use, equivalent to breaking bulk; and therefore, would be sufficient to constitute a larceny. I shall leave it to the jury to say whether the prisoner removed the stave to his mother's with intent to convert it to his own use." The case is briefly reported, but it shows clearly that the prisoner was indicted for stealing staves; two of them he never landed, but he concealed them in the bottom of his boat under some nets. One of the staves which he landed he carried to his mother's house. The judge did not submit to the jury the question touching the two staves which the prisoner did not land, but concealed in the bottom of the boat, and why not? Because he held that the non-delivery, though the prisoner had secreted them did not amount to larceny; that is, there had been no felo-

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nious taking within the definition of larceny, the staves having been intrusted to the prisoner as a bailee to carry them "ashore in his boat." But as the case shows, the prisoner landed one of the staves and carried it to his mother's house, and he left it to the jury to say whether the prisoner removed the stave to his mother's with intent to convert it to his own use. Upon landing the staves the bailment was at an end, and any taking after that would, within all the cases, be a sufficient taking to constitute larceny. The judge talks about separating one of the articles from the rest, and taking it to a place different from that of its destination, if done with intent to appropriate it to the prisoner's own use, being equivalent to breaking bulk. He does not speak of breaking packages, bales or trunks, but as equivalent to breaking bulk.

But in fact, as I understand the case, those remarks of the judge were not called for. If the prisoner had landed the stave, and then took it to his mother's with intent to convert it to his own use, he was guilty; and the only question submitted to the jury was, whether the prisoner removed the stave to his mother's with such intent. That such is the proper construction of this case, see *Rex v. Fletcher and others* (4 C. & P., 545), tried by the same judge. The goods were delivered to the prisoner to be carried to a certain house. They were not carried to such house, but were found at the house of a third person, having been taken out of the packages in which they had been packed by the prosecutor: Paterson, J., said, There is no evidence that the packages were opened while in possession of the prisoners, and a carrier cannot be guilty of larceny unless he breaks bulk, and referred to *Rex v. Madox*. The case was this: the prisoner received two hundred and eighty casks of butter to carry in his ship; on the passage he disposed of thirteen casks, and upon a case reserved, the court held that there was no larceny. The question turned upon the taking; and it was held that there was no breaking of a

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package, bale or box, or breaking of bulk. (*Russ. & Ry.*, 92; *2 Russ. on Cr.*, 60.) This case is in point. The bars of pig iron were as separate and disconnected from each other as were the different casks of butter. A cask of butter was a package by itself, and so was a bar of pig iron weighing one hundred pounds. In other words, the bars of iron did not constitute a package or bale, and the breaking of one bar of iron from the other bars was not the breaking of a package, bale or bulk. In *Rex v. Peatley* (5 C. & P., 533), three trusses of hay were intrusted to the prisoner to carry. The prisoner took one of the trusses away, and it was found in his possession not broken up. Justice Parker held it no larceny, as the prisoner did not break up the truss. These cases show that the taking by a carrier of one package entire, from other packages, is not a taking within the definition of larceny, unless the package taken be broken, and this rule was applied to trusses of hay and to casks of butter. In my opinion, the bars of pig iron in this case were as separate and distinct from each other as were the casks of butter or the trusses of hay. I am therefore of the opinion, that the prisoner could not have been convicted for larceny under the first indictment. He was properly convicted under the second indictment, which was drawn under the *2 Revised Statutes* (p. 679, § 62), which relates to the taking, embezzling or converting, &c., to their use, by carriers, or other persons, the goods of others delivered to them to carry for hire. The punishment is to be the same as if the prisoner had taken, embezzled, converted or secreted such goods or other personal property after breaking the trunk, box, bale or other thing containing the same, or after separating any of them from the other. Our attention was called by the counsel for the prisoner, to the last clause of this section, "or after separating any of them from the other;" and it was suggested that this language showed that there were cases of larceny of goods after separating some of them from others. There is no attempt by the

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statute to change the common law of larceny, and we must go to the common law to ascertain what constitutes larceny; and we have no difficulty in applying this language of the statute, without holding that the taking by a carrier of a cask of butter from other casks, or a truss of hay from other trusses, or a bar of pig iron from other bars, is a larceny. Besides, the object of the section is broader than the argument supposes. It relates to carriers, and their punishment is to be the same as if they had taken, embezzled, converted or secreted such goods. On turning to the revisors' notes to this section, it will be seen that they stated the common law as to the taking, and the effect of it upon carriers, and they declare their object to be to "place carriers precisely on the same footing with servants," which they "conceive is their true legal character."

The prisoner was properly convicted, and the conviction should be affirmed.

SUPREME COURT. Erie General Term, November, 1857. *Davis, Greene and Marvin, Justices.*

CHARLES H. PLATO, plaintiff in error, v. THE PEOPLE,
defendants in error.

Where a person was arrested on a warrant issued by a justice of the peace under the Revised Statutes, and chapter eighty-six, section fourteen of the Laws of 1855, as a disorderly person, for making a noise and disturbance of the public peace, &c., in a public place, and on being brought before such justice, pleaded guilty, and was thereupon sentenced to three months imprisonment in the county jail, and to pay a fine of \$25, and afterwards removed the proceedings by *certiorari* into the Supreme Court, and claimed a reversal of the conviction on the ground that it was an infringement of the provisions of the state constitution,, securing a right of trial by jury, and declaring that no person shall be deprived of life, liberty or property without due process of law (*Const., art. 1, §§ 2 and 6*), it was held, that no such question could be raised on the record, the plaintiff in error having pleaded guilty, and that to have put himself in a position to raise the constitutional question, he should have pleaded not guilty, and demanded a trial by jury, or offered to give bail to appear before the next grand jury to answer to the charge, and the conviction was affirmed.

CERTIORARI to a justice of the peace. Complaint was made on oath to the justice, that Plato was a disorderly person within the intent and meaning of chapter eighty-six, section fourteen of the Laws of 1855, and the Revised Statutes; for that Plato, on the 18th day of July, 1856, in, &c., made a noise and disturbance of the public peace, and did quarrel and fight in a public place, and in view from a public place in said village (Niagara City), to wit, at, &c. The justice issued his warrant, in which the substance of the complaint was recited, and Plato was arrested and taken before the justice. The justice read the complaint to him as stated in the warrant, and the defendant pleaded not guilty, and upon his application the cause was adjourned to the next day, when the defendant appeared and withdrew his plea of not guilty, and plead guilty to the charge in the warrant. The justice then adjudged and ordered that Plato be imprisoned in the common jail of Niagara county for the term of

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three months, and that he pay a fine of \$25, and that he stand committed until the fine should be paid, or until he should be discharged by due course of law.

Plato sued out a *certiorari* for the purpose of reversing the conviction and sentence.

A. W. Brazee, for the people.

A. P. Floyd, for Plato.

By the Court, MARVIN, J. — Plato objects that the law under which he was convicted and sentenced is unconstitutional, and therefore void. The act is an act to amend an act to provide for the incorporation of villages, so far as relates to the village of Niagara City, in the county of Niagara, passed March 26, 1855.

By the fourteenth section of the act (*Laws of 1855*, 129), it is declared that, in addition to those persons described in section one, title five, chapter twenty of the Revised Statutes, all riotous persons, or persons found quarreling or fighting in any alley, street or lane, or in any public place, or in view from any public place, street, lane or alley in said village; any person who shall make an indecent exposure of his person in public view; all persons who shall make a noise or disturbance of the public peace, &c., shall be deemed disorderly persons, and may be proceeded against and punished according to the provisions of this act. The next section provides who may arrest disorderly persons and take them before the justice "to be dealt with according to the provisions of the act." By section sixteen, when the person charged as a disorderly person is brought before the justice, the justice shall proceed, as soon as practicable, to hear, try and determine the complaint or charge on which such person is arrested, or he may adjourn the trial or hearing, &c., and upon conviction of any such offender, the justice shall have the power and is hereby authorized

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to punish such offender by fine not exceeding \$50, or by imprisonment in the jail of Niagara county, at hard labor or not, as such justice shall deem expedient, for a term not exceeding six months, or both such fine and imprisonment.

The counsel for Plato refers to the provisions of the constitution of this state, that "the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever," and that "no person shall be deprived of life, liberty or property without due process of law." (*Art. 1, §§ 2, 6.*)

Plato did not offer to give bail for his appearance at the next criminal court having jurisdiction, nor did he plead not guilty and demand a trial by jury; but, on the contrary, he plead guilty to the charge. The questions presented by his counsel are not involved in the case. The legislature clearly had the power to make the acts complained of punishable as criminal offences, and there is nothing in the constitution restrictive of the power of the legislature to authorize a justice of the peace, upon conviction, to punish the offender by fine and imprisonment.

The Court of Special Sessions, under the act of 1845, is now composed of a single justice. If the prisoner, on being arrested and brought before the justice, in a case in which a Court of Special Sessions has jurisdiction, pleads guilty, I have no doubt the court has power to inflict the punishment provided by the law.

There is nothing in the constitution restraining the legislature from giving jurisdiction to a Court of Special Sessions of all the acts complained of in this case. The constitution provides that no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury. Cases of petit larceny are excepted by this provision. The charges, as contained in the warrant, are, making a noise and disturbance of the public peace, and quarreling and fighting in a public place. Now, these acts are not "capital or otherwise infamous crimes." These acts or offences are not such as were, prior

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to the constitution, uniformly tried by jury. If the legislature, therefore, confers upon a Court of Special Sessions power to try these offences, in the absence of offered bail, the provision that trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever, is not infringed.

By the Revised Statutes, cases of assault and battery, not charged to have been committed wantonly or upon any public officer in the execution of his duties, were triable by a Court of Special Sessions, in the absence of offered bail. (2 R. S., 711, *Law Rep.*, 815; *The People v. Kennedy*, 2 *Park. Cr. R.*, 312.) If the charge in the present case had been for an assault and battery, and the prisoner had offered bail or had requested to be tried by a jury, and the justice had refused the bail and a jury trial, the questions sought now to be raised could have been presented.

In my opinion, the conviction and sentence should be affirmed.

SUPREME COURT. New-York General Term, December, 1857.

Mitchell, Davies and Clerke, Justices.

THE PEOPLE v. SAMUEL JACKSON.

Persons believing in any other than the Christian religion are required by statute (2 R. S., 408) to be sworn according to the peculiar ceremonies of their religion.

A Jew, or Israelite, is usually sworn upon the Hebrew bible, and with his head covered.

Where, on a trial for larceny, the prosecutor, on his cross-examination by the prisoner's counsel, was asked if he had not said to one Emly that he "did not think the prisoner intended to do anything wrong, but wanted to climb too high," and answered that he did "not recollect it," and that he did "not know that he had said so;" and afterwards, on the trial, Emly was called as a witness for the prisoner and asked whether the prosecutor had ever said so to him, and the district attorney objected generally to the evidence, and it was excluded, such exclusion was held to be erroneous.

In such a case, the party making the objection cannot be permitted, on review, to avail himself of the position that the previous question was not sufficiently precise as to time and place, because the objection at the trial was not put on that ground.

J., by falsely representing to S. that he had sold for S. a quantity of goods to E. H. & Co., induced S. to send the goods to the store of E. H. & Co. J. then went to E. H. & Co., with whom he had had, in fact, no dealings on account of S., and informed them that the goods were sent there by mistake, and induced them, by such misrepresentation, to deliver the goods to him, and took them away from the store of E. H. & Co. and converted them to his own use, *held*, that this was larceny, and not simply obtaining goods by false pretences.

CERTIORARI to the Court of General Sessions of the peace in and for the city and county of New-York.

The prisoner was indicted for grand larceny, in stealing the goods of J. Scheuer, and pleaded not guilty. He was tried upon the indictment on the 17th day of November, 1856, before the recorder of said city and a jury.

The people, to maintain the issue on their part, called as a witness,

Joseph Scheuer, who, before being sworn, was asked by prisoner's counsel his religious faith, and answered that he was an Israelite, a Jew; upon being then asked by said

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counsel whether there was not a form of oath more binding and obligatory upon persons of his religious faith, and so considered by them, than the usual form, replied that there was with some, but not with him ; that it was with a skein of silk about the arm, and other ceremonies, which he could not particularly state, but that the usual form was binding on his conscience.

The prisoner's counsel thereupon objected to the witness being sworn in the usual form, and insisted he should be sworn in the form considered most binding upon persons of his religious faith ; but the court overruled the objection, and the witness was sworn in the usual form, upon the Hebrew bible, and covered ; to which the prisoner's counsel excepted.

The witness then testified. I was an importer of goods in May, 1855 ; I knew Samuel Jackson then ; in May, 1855, he called upon me in relation to some satins ; he said he had sold to Richards, Haight & Co., on my account, twenty pieces of satins and ten pieces of other goods, on nine months credit ; there was a sale by me, founded upon what Jackson stated to me, to Richards, Haight & Co. ; he gave me an account of sales to Richards, Haight & Co. ; he did not say where the goods were to be delivered ; these goods which Jackson spoke about were partly in my store ; the satins were in the bonded warehouse ; the satins were in a box marked J. S. & Co., 1040 ; I ordered my custom-house broker to pay duty and send the satin to Richards, Haight & Co. ; I had not seen Richards, Haight & Co. then ; prisoner asked me why I did not send him the goods, why I sent direct to Richards, Haight & Co ? he said it seemed I had not perfect confidence in him, and it would put him in an awkward position with Richards, Haight & Co., as he had told them he had the goods consigned from a house in Boston, and he would stand like a liar before them ; this was after the goods had been sent ; he has never given me any account of the satins ; he said he had taken all the goods to Haggerty,

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Jones & Co.; prisoner said he got advances from them on the goods; prisoner was to bring me the note of Richards, Haight & Co. for the goods; as the note was not brought me by prisoner, I called on Richards, Haight & Co. for it; I inquired if they had given the note to prisoner; I did not get the note; I told Jackson the result of the interview; he did not deny that he had not made a sale; he never brought me a note for the goods; I saw the goods at Haggerty, Jones & Co. after that time; they were sent there without my knowledge; the sale of the goods was on the twenty-ninth of May; I called on Richards, Haight & Co. about the sixth of July for the notes.

Cross-examined. First knew the prisoner in April, 1855; I made an arrangement with him to sell goods for me at two and a half per cent commissions; I was to have control of the customers; prisoner brought me a list of his business acquaintances in Philadelphia; prisoner reported sales to me; after this to Richards, Haight & Co., and I delivered goods to Jackson himself; I directed the carman to take the satin to Richards, Haight & Co.; the prisoner being dissatisfied by my sending to them direct, at his request I allowed nine pieces of serge to go to Jackson himself; Jackson was to bring me the notes, or I could get them myself; a civil suit was commenced by me; I acted wholly under the advice of my counsel; I made a complaint against him December 8th, 1855; my civil claim he tried to settle with me; I commenced a civil suit in July, 1855.

Prisoner's counsel then offered to prove that a civil suit had been commenced by prosecutor against the prisoner, for other property, including these twenty pieces of silk, on 12th July, 1855, in New-York Common Pleas. That Jackson was arrested and held to bail; that no defence was put in, Jackson being then in Eldridge-street prison, and that when judgment was finally taken, it was taken, omitting these goods; that the judgment had been delayed until a

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motion was made to compel the entry of judgment, and that meantime this indictment was obtained.

This offer was overruled, and the prisoner's counsel excepted.

District attorney admitted suit commenced July, 1855.

Cross-examination resumed. It might be that I said to Emly that I didn't think Jackson wanted to do anything wrong, but wanted to climb too high; but I don't recollect it; don't know that I said so; it was after Jackson was arrested; I sent some goods to other houses under this arrangement, by Kingsley's express.

Direct, resumed. I had six orders for goods from Jackson, to be sent to different parties.

Question. In any of those transactions, have you ever received the pay?

Objected to by defendant's counsel as irrelevant and improper, as Jackson could not be here tried for any other transaction.

Objection overruled, and exception by prisoner's counsel.

Answer. No sales have been made. They have all gone to Haggerty, Jones & Co., and he has received advances on them, and also advances from others upon them. The goods he pretended to sell were not sent to the persons he pretended to have sold to, but were appropriated by him except in those cases where he paid me.

The people then called *George Flagg*, who, being duly sworn, testified: I am one of the firm of Richards, Haight & Co.; in May, 1855, a box of satins was brought to our store; while that box was in our possession Samuel Jackson came in; I saw the inside of the box; it contained black satins; I saw at least one piece containing forty or fifty yards; should think its lowest value would be \$1.50 per yard; I heard Jackson say that box was sent there by mistake; the box was taken away by Mr. Jackson; we delivered the box to him; at that date we did not have any business connection with Jackson in relation to that box of

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satins, nor with Mr. Scheuer; the goods were received into our store and taken care of by our firm.

The people then called *Benjamin Taylor*, who, being duly sworn, testified: that he took the satins in question, by direction of Warren Carter, custom-house broker, to the store of Richards, Haight & Co., and delivered them there in May, 1855; and that Richards, Haight & Co. received the goods and gave a receipt for them; box was marked J. S. & Co., 1040.

The people then called *Warren Carter*, who, being duly sworn, testified: That he was a custom-house broker in May, 1855; and that by direction of Joseph Scheuer, the prosecutor, he sent by the witness, Taylor, the satins in question to Richards, Haight & Co., and that the prosecutor directed him to deliver the goods to Richards, Haight & Co.; the box was marked J. S. & Co., 1040.

The prisoner's counsel then called — *Emly*, who, being duly sworn, was asked this question: .

Question. Did Joseph Scheuer ever say to you that he did not believe the prisoner intended to do anything wrong, but was trying to climb too high?

The question was objected to by the district attorney, and excluded by the court, to which the prisoner's counsel excepted.

Solomon Palmer, being duly sworn for the people, gave evidence, showing that the satins in question were sent to the store of Haggerty, Jones & Co. in June, 1855 (auctioneers), and an advance made to the prisoner upon them.

On cross-examination, he testified to prisoner's good character, which the district attorney admitted to be good, irrespective of the circumstances of the case.

The testimony being closed, the prisoner's counsel requested the court to charge the jury:

First. That under the evidence the prisoner was entitled to a verdict of acquittal.

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The court refused so to charge, to which refusal the prisoner's counsel excepted.

Second. That if the jury believed that the prosecutor intended to part with the property in the goods, the prisoner was entitled to an acquittal.

The court refused so to charge, to which refusal the prisoner's counsel excepted.

Third. That if the jury find that the prosecutor parted with the property, as well as the possession of the goods, the prisoner is entitled to an acquittal.

The court refused so to charge, to which refusal the counsel for the prisoner excepted.

Fourth. If the jury find that the prosecutor, at the time he delivered the goods to Richards, Haight & Co., intended to part with the property in as well as the possession of the goods, the jury must find a verdict for the prisoner.

The court refused so to charge, and the counsel for the prisoner excepted to such refusal.

The court thereupon charged the jury, that, if they found there was no sale of the goods to Richards, Haight & Co., the possession of the goods by them was the possession of the prosecutor, and the legal possession was in him.

To this the prisoner's counsel excepted.

(And if they so found, it was of no consequence whether the prosecutor intended to part with the property in the goods); and that to constitute a sale, there must be the act and consent of two parties, buyer and seller.

To this clause in parenthesis, the prisoner's counsel excepted.

The court further charged, that if the jury believed that the goods were taken by prisoner from the store of Richards, Haight & Co., with the intention of converting the same to his own use, and the statement to Scheuer was a device to get possession, and there was no sale to them; as a matter of law it was a larceny, and that in law the property was still in Scheuer.

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To which the prisoner's counsel also excepted.

The prisoner's counsel also excepted to the charge, as far as it was contrary to the requests to charge, submitted by him.

The jury found the prisoner guilty, and a bill of exceptions was made and settled.

The following certificate was made by the recorder :

"I decline to give a certificate of probable cause in this case, for the reason that I do not consider the exceptions to the ruling upon the evidence, or the exceptions to the charge of the court, well taken; that the request to charge upon the question of the parting by the complainant with the possession and the property, does not apply to the facts in this case, for the reason that the evidence shows that the complainant did not part with the possession or property, the possession of Richards, Haight & Co. being the possession of the complainant, as no sale of the goods had been made.

JAMES M. SMITH, Jr.,

Recorder of the City and County of New-York.

After which, the following certificate was made by Judge Birdseye :

I certify that, in my opinion, there is probable cause for the within bill of exceptions, and so much doubt as to render it expedient to take the judgment of the Supreme Court upon the exceptions.

LUICIEN BIRDSEYE,

Justice Supreme Court.

New-York, November 19, 1856.

H. R. Dyett, for the prisoner.

A. Oakey Hall (District Attorney), for the people.

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By the Court, MITCHELL, J.—Scheuer was an importer of goods, and arranged with Jackson to sell goods for him at a commission of two and a half per cent, Scheuer to have a control of the customers. Jackson represented to Scheuer that he had contracted to sell for him, to Richards, Haight & Co., twenty pieces of satin and ten pieces of other goods, and gave an account of the sales to Scheuer. Scheuer, who proves these facts, adds: "There was a sale by me, founded upon what Jackson stated, to Richards, Haight & Co." The satins were in the bonded warehouse, the other goods at Scheuer's store. Scheuer ordered the satins direct to the store of Richards, Haight & Co., and Jackson expressing the opinion that this showed a distrust of him, Scheuer allowed nine pieces of the goods to go from his store to Jackson. Jackson was to bring notes for the amount to Scheuer, but did not do so. He never rendered any account of the satins. He admitted that he took the goods which he received to Haggerty, Jones & Co., and obtained an advance upon them. The same witness proved that he had six orders from Jackson for goods to be sent to other persons, and was allowed to testify that he had never been paid for those goods; that they were not sent to the persons to whom he pretended they were sold, but had gone to Haggerty, Jones & Co., from whom Jackson had received advances on them, except in cases where Jackson had paid him. It was shown that the pieces of satin were sent from the bonded warehouse, by order of Scheuer, to Richards, Haight & Co., and that then Jackson came there and said the box was sent them by mistake and took it away, and that they had no business relations with Scheuer. Jackson then took the goods to Haggerty, Jones & Co., and obtained an advance upon them.

The court was requested to charge that if Scheuer intended to part with the property in the goods, the prisoner was entitled to an acquittal, but refused; also, to charge that if the prosecutor, when he delivered the goods to

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Richards, Haight & Co., intended to part with the property, as well as the possession of the goods, the jury must find for the prisoner, but the court again refused.

The court charged that, if there was no sale to Richards, Haight & Co., it was of no consequence whether the prosecutor intended to part with the property in the goods or not.

The recorder, in his certificate, states that he made these rulings because the evidence showed that the complainant did not part with the possession or property, and so the question of law implied in the request did not arise. The question was submitted to the jury, whether the prisoner made the representation to Scheuer as a device to get possession of the goods, and then took them from Richards, Haight & Co., with the intention of converting them to his own use.

The prosecutor testified that he might have said to Emly that he did not think Jackson would do anything wrong, but wanted to climb too high; but he did not recollect it, and did not know that he said so.

The prisoner asked Emly if Scheuer had ever said so to him, and the question was excluded.

It does not appear that any objection was taken to the question on account of the previous question to the prosecutor not being sufficiently precise as to time and place; otherwise the question was proper, as it tended to discredit the prosecutor. He had negatived the idea of his having made this statement by the mode of his answering. If he had answered that he had said so, as it must be assumed Emly would have testified, then the jury would have had before them the inconsistency of his prosecuting a man for stealing, while he had declared that he did not believe the man intended any wrong. The statement, or his evidence, would require some explanation, and might have led to his discredit with the jury, or to have made them believe that the prisoner did not make the representations to Scheuer with a view to get the goods from Haight and convert them

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to his own use. It might be entitled to extremely little weight, but it was entitled to some.

If Jackson had bought the goods of Scheuer under these false pretences, he would have been liable only for the false pretence; there would then have been an intention to pass the title of the possessor to the person to whom they did pass. The goods could not be said to have been feloniously taken from the owner, when they had been voluntarily delivered by him, with the intention of passing the title, although he was induced to do so by a false statement. But if he was led by the false pretence merely to send the goods to Richards, Haight & Co., where they still remained as his, because Richards, Haight & Co. did not mean to buy them and had never agreed to buy them, then, when the goods were taken from the latter they were taken without any assent of the owner, and from a possession of one whose possession was the same as that of the true owner. The false pretence did not lead to the delivery of the goods to the prisoner, but to the delivery of them to Richards, Haight & Co. It had exhausted its delusive effect when that was accomplished, and when the defendant took the goods from them he did so by an additional deception, in which the deceived party had no intention to pass the property.

It was proved that the prisoner's character was good, and it was admitted that it had been so, except in these transactions. If his understanding of his offence is rendered more acute it may not be a cause of regret to reverse the judgment.

The conviction must be reversed and a new trial granted.

SUPREME COURT. New-York General Term, December, 1857.
Mitchell, Clarke and Davies, Justices.

THE PEOPLE *v.* DAVID S. PAGE.

The provision of section sixteen of the "act to suppress intemperance, and regulate the sale of intoxicating liquors," passed April 16, 1857 (*Laws of 1857, ch. 628*), by which the sum of one hundred dollars is prescribed as the penalty of the bond to be taken where a person is arrested and brought before a magistrate, charged with being found actually engaged in violating that act, is not applicable to the case of a person indicted under the twenty-first section of that act, and afterwards arrested under the indictment. In the latter case the amount of bail is not fixed by statute, but is left to the discretion of the magistrate.

The twenty-first section of the act, which declares it a misdemeanor for an inn, tavern or hotel keeper or person licensed to sell liquors, to sell or give away any intoxicating liquors or wines on Sunday, is not applicable to persons other than those thus designated; and it is not, therefore, an indictable offence, under the statute, to sell or give away intoxicating liquors or wines on Sunday, when the act is done by a person who is not licensed to sell liquors, or who is not the keeper of an inn, tavern or hotel.

For the selling of such liquors on Sunday, by persons not enumerated in the twenty-first section, the only punishment is the infliction of a money penalty provided for selling without a license by other sections of the act, and there is no distinction in the kind of punishment, whether the sale be made on Sunday or on any other day of the week.

It is no valid objection to an indictment for a violation of the twenty-first section of the act, that the defendant had not been first arrested and taken before a magistrate.

Form of an affidavit for the allowance of a writ of *certiorari* to remove into the Supreme Court, for review, a decision made on *habeas corpus* under 2 *Revised Statutes* (p. 573, § 69); also, form of such writ and return thereto, including proceedings on *habeas corpus* and *certiorari* to certify cause of detention.

THIS cause came before this court on *certiorari* to review the proceedings had before the recorder of New-York, on *habeas corpus*. The affidavit for the allowance of the writ of *certiorari* was as follows :

The People of the State of New-York

v.

David S. Page.

City and County of New-York, ss :

A. Oakey Hall, district attorney of the city and county of New-York, being duly sworn, deposeth and saith : That, on

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or about the fifth day of September, instant, a writ of *habeas corpus* was issued out of the Supreme Court, allowed by, and returnable before the Honorable James M. Smith, Jr., one of the justices of the Court of General Sessions, for the relief of one David S. Page, for the cause of the detention of the said David S. Page, to which a return was made, and a traverse interposed thereto; that a writ of *certiorari* was also issued, and allowed, and returnable before the said justice. That, on said returns, deponent was heard before said justice, and on the tenth day of September, instant, an order was made by said justice, and under said order the said David S. Page, the party named therein, was discharged from custody, and a final adjudication was thereupon made by said justice; and further saith not.

A. OAKLEY HALL.

Sworn before me, this 10th day }
of September, 1857. }

C. A. PEABODY.

The writ issued thereon was as follows :

The People of the State of New-York, to the Honorable James M. Smith, Jr., one of the justices of the Court of General Sessions, greeting :

Whereas, we have been informed, by the official affidavit of the district attorney of the city and county of New-York, that writs of *habeas corpus* and *certiorari* were severally heretofore issued by you, under your hand and seal, on behalf of one David S. Page, directed, the said writ of *habeas corpus* to the warden of the city prison in the county of New-York, and the said writ of *certiorari* to the district attorney of the city and county of New-York; and the said writ of *habeas corpus* requiring the said warden to have the body of the said David S. Page before you, the said justice, to be dealt with according to law; and the said writ of *certiorari* requiring the said district attorney to certify to you, the

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said justice, the papers containing the cause of his imprisonment.

And whereas, pursuant to the requirements of the said several writs, the body of the said David S. Page, and the papers of his examination, were brought before you; and whereas such returns were made upon the said several writs, that thereupon you proceeded to hear and determine the said several writs; and whereas such proceedings were had upon the said several writs and several returns, that you, the said justice, did order, adjudge and determine, that the said David S. Page should be discharged from the custody or restraint of the said warden of the city prison; and we being willing to be certified of such proceedings as were had before you, do command and strictly enjoin you, that you do certify and return those proceedings, with all things, papers and schedules thereto appertaining, unto our justices of our Supreme Court, at the city hall in the city of New-York, on the second Monday of September, instant, at the general term of said court, under your hand, as fully and amply as the same remain before you, so that our said justices may further cause to be done thereupon what of right and according to law ought to be done, and have you then and there this writ.

Witness, Honorable Charles A. Peabody, one of the justices of our said court, at the city hall in the city of New-York, the tenth day of September, in the year of our Lord, one thousand eight hundred and fifty-seven.

By the court,

RICHARD B. CONNOLLY, *Clerk.*

Allowed September 10, 1857.

C. A. PEABODY.

The following return was made by the recorder :

I, James M. Smith, Jr., one of the justices of the Court of General Sessions of the peace of the county of New-York,

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in obedience to the annexed writ, do return as follows in the annexed schedule.

JAMES M. SMITH, JR.

September 11, 1857.

To the Honorable James M. Smith, recorder of the city of New-York :

The petition of D. P. McBrien shows that David S. Page is now a prisoner restrained of his liberty, in the custody of John A. Gray, Esq., keeper of the city prison, and that he is not committed or detained by virtue of any process issued by any court of the United States, or by any judge thereof; nor is he committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree; that the cause or pretence of such imprisonment or detention, according to the best of the knowledge and belief of your petitioner, is, that he was committed by Justice Connolly for an alleged violation of an act to suppress intemperance and to regulate the sale of intoxicating liquors, passed April sixteenth, one thousand eight hundred and fifty-seven, by the senate and assembly of the State of New-York, a copy of which commitment is hereto annexed, marked A.

The said petitioner has also been indicted upon said charge, wherefore your petitioner prays that a writ of *habeas corpus* and *certiorari* issue, directed to John A. Gray, keeper of the city prison, and the district attorney and clerk of the Court of Sessions, commanding him to bring the body of your petitioner before your honor, to do and receive what shall then and there be evidence concerning him.

D. P. MCBRIEN.

Dated 4th day of September, 1857.

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City and County of New-York, ss :

D. P. McBrien, being duly sworn, doth depose and say, that the facts set forth in the above petition subscribed by him are true.

D. P. MCBRIEN.

Sworn before me, this 4th)
day of September, 1857. }

HORACE ANDREWS, *Commissioner of Deeds.*

The People of the State of New-York, to John A. Gray,
[L. s.] *Greeting :*

We command you that you have the body of David S. Page, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name he shall be called or charged, before Hon. James M. Smith, Recorder of the city of New-York, at his chambers, number twenty Chambers-street, in the said city of New-York, on the fourth day of September, one thousand eight hundred and fifty-seven, at three o'clock, P. M., of that day, to do and receive what shall then and there be considered concerning him, and have you then there this writ.

Witness, James J. Roosevelt, Justice Supreme Court, the fourth day of September, one thousand eight hundred and fifty-seven.

By the court,

R. B. CONNOLLY, *Clerk.*

D. B. TAYLOR, *Attorney.*

(Indorsed.)

Allowed.

JAMES M. SMITH, Jr., *Recorder.*

I return that I hold the within named prisoner by virtue of the annexed commitment.

JOHN A. GRAY, *Warden.*

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City and County of New-York, ss :

By Michael Connolly, Esq., one of the police justices in and for the city of New-York, to the constables and policemen of the said city, and every of them, and to the keeper of the city prison of the said city :

These are, in the name of the People of the State of New-York, to command you, the said constables and policemen, and every of you, to convey to the said prison the body of David S. Page, and deliver him to the keeper thereof; and you, the said keeper, are hereby commanded to receive into your custody, in the said prison, the body of the said David S. Page, who stands indicted by the grand jury of the city and county of New-York for misdemeanor, to wit, selling liquor on Sunday, and that you safely keep the said David S. Page in your custody, in the said prison, until he shall find surety in the sum of two hundred dollars, to answer said complaint, or be thence delivered by due course of law.

Given under my hand and seal this fourth day of September, [L. s.] one thousand eight hundred and fifty-seven.

MICHAEL CONNOLLY,
Police Justice.

Certiorari to certify cause of detention :

The People of the State of New-York, to the district attorney of the city of New-York, and the clerk of the Court of General Sessions, *Greeting :*

We command you that you certify fully and at large to Hon. James M. Smith, recorder of the city and county of New-York, at his chambers, Number twenty Chambers-street, on the fourth day of September, one thousand eight hundred and fifty-seven, at four o'clock, P. M., the day and cause of the imprisonment of David S. Page, by you detained, as is said, by whatsoever name the said David S.

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Page shall be called or charged ; and have you then there this writ.

Witness, James J. Roosevelt, Justice of the Supreme Court, the fourth day of September, one thousand eight hundred and fifty-seven.

By the court,

RICHARD B. CONNOLLY, *Clerk.*

D. B. TAYLOR, *Attorney.*

(Indorsed.)

Allowed.

JAMES M. SMITH, Jr., *Recorder.*

I return to this writ of *certiorari* that the cause of imprisonment of the said David S. Page is an indictment hereto annexed in my custody, for the trial thereof, by the rules of the Court of General Sessions, wherein it was found and filed.

A. OAKLEY HALL,
District Attorney.

September 5, 1857.

City and County of New-York, ss :

The jurors of the people of the state of New-York, in and for the body of the city and county of New-York, upon their oath, present : That David S. Page, late of the eighth ward of the city of New-York, in the county of New-York, aforesaid, on Sunday, the ninth day of August, in the year of our Lord one thousand eight hundred and fifty-seven, did, willfully, unlawfully and maliciously, sell to divers citizens of this state, and to divers persons to the jurors unknown, and did cause to be sold to divers citizens of this state, and to divers persons to the jurors unknown, at the ward, city and county aforesaid, on the Sunday aforesaid, intoxicating liquors, to wit, one pint of wine, one pint of brandy, one pint of gin, one pint of rum, one pint of whiskey, one pint

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of lager bier, and one pint of cordial, as a beverage, in contempt of the people of the State of New-York, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That afterwards, to wit, on Sunday, the ninth day of August, in the year of our Lord one thousand eight hundred and fifty-seven, the said David S. Page, did, willfully and unlawfully give away to divers citizens of this state, and to divers persons to the jurors unknown, at the ward, city and county aforesaid, on the said Sunday, intoxicating liquors, to wit, one pint of wine, one pint of brandy, one pint of gin, one pint of rum, one pint of whiskey, one pint of lager bier and one pint of cordial, as a beverage, against the form of the statute in such case made and provided, and against the peace of the people of the State of New-York, and their dignity.

A. OAKLEY HALL,
District Attorney.

BEFORE THE RECORDER AT CHAMBERS.

The People, &c.
v.
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} *Traverse to the return to the
habeas corpus and certiorari.*

The defendant, by his attorney, traverses and denies the return, and the sufficiency in law thereof; and further denies that the indictment is sufficient cause for his detention and imprisonment, and denies that the indictment is in the custody of the district attorney by the rules of the Court of General Sessions; and the defendant further alleges, that the indictment is void on its face, in this, that it does not charge or describe against the defendant any offence; and the defendant further alleges, that the indictment has been obtained surreptitiously, and against the provisions of the

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Code, entitled, "An act to suppress intemperance and to regulate the sale of intoxicating liquors," passed April sixteenth, one thousand eight hundred fifty-seven; and the defendant further alleges, that no complaint was made against him before any magistrate, and that he was not arrested or brought before any magistrate charged with the violation of any of the sections of the aforesaid act, as required by the sixteenth section thereof; and defendant alleges, that he has had no opportunity to elect to be tried before a magistrate as provided in the sixteenth section of said act; and the defendant further alleges, that in violation of the provisions of said act, he has been illegally arrested, and deprived of his liberty without notice, and without opportunity to give the bail of one hundred dollars, as provided by the sixteenth section of said act, but has been required to give bail in the sum of two hundred dollars, contrary to the provisions of said act.

D. B. TAYLOR,
Attorney.

City and County of New-York, ss.

D. S. Page, the defendant, being duly sworn, says: that the facts set forth in the foregoing answer are true, to the best of his knowledge, information and belief.

D. S. PAGE.

Sworn before me, September }
7th, 1857. }

WM. G. McLAUGHLIN,
Commissioner of Deeds.

I order the discharge of the defendant from custody, upon the ground that the commitment is irregular.

JAMES M. SMITH, Jr.,
Recorder.

September 10th, 1857.

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On making the decision, the following opinion was delivered by the recorder :

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On the fourth instant, application was made to me for a writ of *habeas corpus* and *certiorari*. By the return to the writ of *habeas corpus*, it appeared that the defendant was in custody, in default of bail, in the sum of two hundred dollars, upon a commitment issued by Justice Connolly, which commitment was predicated upon an indictment for an alleged misdemeanor, the charge being for selling liquor on Sunday. On the return to the *certiorari*, it appeared that the indictment was filed on the eleventh of August. The indictment was returned as the cause of the commitment. It does not allege that the defendant was licensed to sell as an inn, tavern or hotel-keeper.

The traverse of the defendant to the return on the writ of *certiorari*, is as follows: "The defendant, by his attorney, traverses and denies the return, and the sufficiency in law thereof, and further denies that the indictment is sufficient cause for his detention and imprisonment, and denies that the indictment is in the custody of the district attorney by the rules of the Court of General Sessions. And the defendant further alleges that the indictment is void on its face, in this, that it does not charge or describe against the defendant any offence. And the defendant further alleges, that the indictment has been surreptitiously obtained and against the provisions of the act, entitled 'An act to suppress intemperance, and to regulate the sale of intoxicating liquors,' passed April sixteen, one thousand eight hundred and fifty-seven. And the defendant further alleges, that no complaint was made against him before any magistrate, and that he was not arrested and brought before any magistrate, charged with the violation of any of the sections of the aforesaid act, as

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required by the sixteenth section thereof. And the defendant further alleges, that he has had no opportunity to elect to be tried before a magistrate, as provided by the sixteenth section of said act. And the defendant further alleges, that, in violation of the provisions of said act, he has been illegally arrested and deprived of his liberty, without notice, and without opportunity to give the bail of one hundred dollars, as provided by the sixteenth section of said act, but has been required to give bail in the sum of two hundred dollars, contrary to the provisions of said act."

To this traverse the district attorney demurred, on the ground that there are no facts stated therein which would warrant the discharge of the defendant. The legal effect of this demurrer is, to admit the allegations of fact as set forth in said demurrer.

The facts, therefore, upon which I am to pass in this case are as follows: On the 11th day of August, 1867, an indictment was filed in the Court of General Sessions, charging the defendant with a misdemeanor in selling liquor on Sunday, the ninth of August, contrary to the statute; that such indictment was found without a preliminary complaint before a magistrate and the arrest of the defendant as provided in section sixteen of the act; that the defendant was held to bail in the sum of \$200; that he was in custody by virtue of a commitment predicated upon the indictment, in default of giving bail in that amount. It was also conceded by the respective counsel that the defendant had not obtained a license to sell liquor as an inn, tavern, or hotel keeper.

The district attorney moved to discharge the writ, on the ground that the indictment was a record imputing verity upon its face, and that it could not be inquired into or impeached collaterally.

It is not necessary, in order to secure to the defendant his rights under the writ of *habeas corpus* or *certiorari*, that this proposition should be controverted. It is made the duty of the officer before whom a party is brought upon the writ to

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examine into the facts contained in the return, and into the cause for the confinement or restraint of the party; and, upon such examination, it is his duty to remand, or to discharge, or bail, in his discretion, if the offence be bailable. He may, in his discretion, discharge the defendant on nominal bail, or he may discharge defendant on his own recognizance. The object of the hearing is, to place the officer in possession of the facts, that he may judiciously exercise his discretion. Therefore, although the indictment cannot be discharged by the judge at chambers, still if, upon hearing, he comes to the conclusion that the allegations in the indictment do not constitute an offence in law, it is his duty to exercise his discretion upon the question of bail to its fullest extent.

The questions at issue in this case are important ones. Many indictments which were found, at the last term of the court, under similar circumstances, are still pending in the Court of General Sessions, the legal questions upon which are the same as are involved in this.

The indictment is found under the twenty-first section of the act entitled "An act to suppress intemperance and to regulate the sale of intoxicating liquors," passed April 16, 1857. This section is as follows:

"No inn, tavern or hotel keepers, or persons licensed to sell liquors, shall sell or give away any intoxicating liquors or wines on Sunday, or upon any day upon which a general or special election or town meeting shall be held, and within one quarter of a mile from the place where such general or special election or town meetings shall be held in any of the villages, cities or towns of this state, to any person whatever, as a beverage. In case the election or town meeting shall not be general throughout the state, the provisions of this section, in such case, shall only apply to the city, county, village or towns in which such election or town meeting shall be held. Whoever shall offend against the provisions of this section shall be deemed guilty of a mis-

demeanor, and on conviction shall be imprisoned in a county jail, workhouse or penitentiary not more than twenty days."

It is a principle well settled that all penal statutes must be construed strictly; that nothing can be taken by implication against the party to be affected by them. Under the denomination of penal statutes, within this rule, are included "statutes which give a summary remedy; those made in derogation of the common law; statutes which impose restrictions upon trade or common occupations, or which levy an excise tax on the citizen." At common law it is not an offence to sell liquor, "and in the construction of statutes made in derogation of common right, care should be taken not to extend them beyond the express words of their clear import." It was conceded before me on the argument that the defendant was not the keeper of an inn, tavern or hotel, or licensed to sell liquors. The twenty-first section applies to such persons and such persons only. Courts have not the power to correct defective legislation. Their duty is to administer the law as they find it, and where it is ambiguous to interpret it by certain recognized rules and principles.

In order to make the twenty-first section applicable to the indictment, it would be necessary for the court to add to it the words, "or any other person." As the section now stands, those only who are licensed to sell incur the penalty of misdemeanor for selling on Sunday. This may not have been the intention of the legislature, but it is the letter of the law. In remedial statutes, courts may give a liberal and extended meaning in order to carry the intention of the legislature into effect; but the reverse is the rule in the construction of penal statutes. The act under consideration is highly penal, and it points out specifically certain penalties for different offences committed under it. Section thirteen declares that "whoever shall sell any strong or spirituous liquors or wines in quantities less than five gallons at a time

without having a license therefor, granted as herein provided, shall forfeit \$50 for each offence."

It cannot be contended that for a violation of that section a party can be legally indicted. This section applies to all who are not licensed who sell in quantities less than five gallons, and supersedes all other statutes upon that question.

The fourteenth section prescribes the penalty for selling without an inn, tavern or hotel keeper's license, and declares that: "Whoever shall sell any strong or spirituous liquors or wines, to be drank in his house or shop, or any out-house, yard or garden appertaining thereto, or shall suffer or permit any such liquors or wines sold by him or under his direction or authority, to be drank in his house or shop, or in any out-house, yard or garden thereto belonging, without having obtained a license therefor as an inn, tavern or hotel-keeper shall forfeit \$50 for each offence."

Under this section also, there is a specific penalty; but the offence is not declared a misdemeanor, and therefore is not indictable. In the fifteenth section the language is different, and the violation of part of that section is expressly declared to be a misdemeanor, and the penalty is prescribed.

The sixteenth section points out the manner in which offences under the act shall be brought to justice. This section is plain and specific in its directions. It makes it the duty of every sheriff, under sheriff, deputy sheriff, constable, marshal, policeman or officer of police, to arrest all persons actually engaged in violation of the provisions of the act, and forthwith to carry such persons before any magistrate, to be dealt with according to the provisions of the act. It points out the duty of the magistrate. It gives the parties charged the privilege of being tried before the magistrate, or giving bail to appear at the Sessions or Oyer and Terminer. It fixes the amount of bail at \$100. It directs the magistrate in all cases to entertain the complaint, and to transmit the affidavits, &c., taken before him, to the

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district attorney, and the district attorney is directed to prosecute the offender.

The twenty-ninth section makes it the duty of courts to instruct grand jurors to inquire into all offences against the provisions of the act, and to present all offenders under it. By the act of 1855, the Special Sessions of the city and county of New-York, have exclusive jurisdiction in all cases of misdemeanors, unless the defendant elects to be tried by the General Sessions. That act is still in force. The fact that the grand jury are directed to present all offenders under the excise law does not conflict in any manner with the act of 1855, above referred to. It means no more nor less than that they are to entertain all complaints legally prosecuted, and present all offenders legally charged. I have, in all cases since the passage of the act of 1855, called the attention of the grand juries to its provisions, and instructed them that they had no right to entertain complaints in cases of misdemeanors, unless preliminary proceedings had been taken before a magistrate. I so instructed them at the time when this indictment was found. I so decided in the case of *The People v. Edgar and others*; and had a motion in this case been made before me to quash this indictment when the same was presented, I should have granted it upon the ground that it was illegally found, the defendant having been denied a substantial right guaranteed to him by the statute.

It was suggested on the hearing that the violation of a penal statute was made a misdemeanor; that is so in all cases where the statute does not prescribe the penalty of the offence, but in those cases only. Under the act in question, the penalty is prefixed specifically in all cases; therefore this general provision of the statute does not apply.

The only penalty for selling liquor without a license to be drunk on the premises, &c., either on a Sunday or on a week day, is prescribed in the thirteenth section. That sec-

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tion does not declare the sale to be a misdemeanor, therefore it is not an indictable offence, though the penalty is severe. The twenty-first section expressly declares it to be a misdemeanor to sell in violation of that section. The remedy to punish the party violating section fourteen, is by an action for the penalty brought by the board of commissioners of excise.

Entertaining these views as to the act under consideration, I should consider it my duty to discharge the defendant upon his own recognizance, if the commitment was regular. But this commitment is illegal. By the commitment it appears that the defendant is in custody in default of bail in the sum of \$200. The statute fixes the bail at \$100.

I therefore order that the defendant be discharged from custody by reason of the irregularity of the commitment. If, upon any collateral hearing, the question as to the validity of the indictment could be entertained, I should not hesitate to discharge the defendant upon the ground that the offence charged was not indictable under the act.

A. Oakley Hall (District Attorney), for the people.

D. B. Taylor, for the defendant.

By the Court, DAVIES, J.—On the 11th of August, 1857, David S. Page was indicted by the grand jury of the city and county of New-York, for a violation of the provisions of section twenty-one of chapter six hundred and twenty-eight of the Laws of one thousand eight hundred and fifty-seven.

This section declares that no inn, tavern or hotel keeper, or person licensed to sell liquors, shall sell or give away any intoxicating liquors or wines on Sunday, and that whoever offends against the provisions of that section shall be guilty of a misdemeanor, and on conviction shall be imprisoned in the county jail, work-house or penitentiary not more than

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twenty days. On this indictment being found, a warrant was issued by one of the police justices directing the arrest and confinement of the defendant in the city prison, in default of his giving bail in the sum of \$200. The defendant applied to the recorder for a writ of *habeas corpus*, for the purpose of inquiring into the cause of his detention; and, on the return, he was discharged from custody by the recorder. These proceedings have been removed into this court under 2 *Revised Statutes* (p. 573, § 69), which authorizes these proceedings to be removed into this court "to be there examined and corrected."

It was objected that the commitment by the magistrate was irregular, in that he held the defendant to bail in the sum of \$200, whereas, by the sixteenth section of this act, the magistrate could only hold to bail in the sum of \$100.

It will be seen, we think, by a reference to that section, that its provisions do not apply to a case of indictment found. They make it the duty of any sheriff, under sheriff, deputy sheriff, constable, marshal, policeman, or other officer of police, to arrest all persons found actually engaged in the violation of the provisions of that act, and forthwith to carry such offender before any magistrate, whose duty it is, on due proof of such offence, to require a bond to be executed by such offender, in the penal sum of \$100, conditioned that he will appear and answer the charge at the next Court of Oyer and Terminer, or Sessions, and abide the order and judgment of the court thereon, or, in default of such bond, to commit the offender to the county jail until such judgment of said court, or until he be discharged according to law. By said section it is also made the duty of any magistrate to entertain any complaint for a violation of that act, and forthwith issue a warrant and cause such offender to be brought before him to comply with the provisions of that section. We think, therefore, that the action of the magistrate, in the first instance, is to be invoked when the offender is found actually engaged in the commission of the offence;

in such case the magistrate is to take security in the penal sum of \$100, or, in default, commit the offender; and in the next place, on complaint made to him, to issue a warrant and cause the offender to be brought before him, and when so brought to proceed in the same manner as if such offender had been actually found engaged in the commission of the offence.

The case now under consideration is different from these, and consequently the provisions of this section are inapplicable to it. The defendant has been indicted by the grand jury, and arrested by a police justice to answer such indictment, and it follows that he has full authority to fix the amount of bail, and in default of giving it, to commit the defendant. We find no provision in the act restricting the amount of bail to be taken from a defendant arrested after indictment, and for the reason stated the limitation prescribed in section sixteen we deem inapplicable to this case. It follows, therefore, that there was no irregularity in the commitment.

If the commitment was irregular, it became the duty of the officer before the matter was heard to hold the defendant to bail, if it should appear that the party has been legally committed for any criminal offence. The recorder, therefore, properly proceeded to inquire whether the indictment charged any criminal offence against the defendant, and being of the opinion that it did not, he discharged the defendant. The inquiry is thereupon presented, whether any offence, upon the facts stated in the indictment, has been committed by the defendant. The indictment charged that the defendant, on Sunday, the ninth of August last, sold to divers persons liquor, contrary to the form of the statute, and on the same day did give liquor to divers persons, also against the form of the statute. The twenty-first section of the act of April 15, 1857, is relied on to sustain this indictment. It provides that no inn, tavern or hotel keeper, or person licensed to sell liquor, shall sell or

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give away any intoxicating liquors or wines on Sunday, and that "Whoever shall offend against the provisions of this section shall be guilty of a misdemeanor." The persons prohibited from selling or giving away liquors on Sunday are, inn, tavern or hotel keepers, or persons licensed to sell liquors. They are the persons prohibited; it is not the selling or giving away liquor on Sunday which is declared to be illegal, but the selling or giving it away by an inn, tavern or hotel keeper, or person licensed to sell liquors. It is only this class of persons who are enjoined from doing this; and the word "whoever," used in this section, must have relation to these enumerated persons. Whoever offends against the provisions of that section is guilty of the offence; the persons who can offend against these provisions are, inn, tavern or hotel keepers, or persons licensed to sell liquors. If they offend they are guilty of the misdemeanor, and therefore it is vital, to establish the crime, that the person charged should be one of those prohibited by the section. Such proof being necessary to convict, it follows that it must be averred in the indictment to constitute the offence. The selling or giving away liquor by this defendant on Sunday, he not being, or averred to be, an inn, tavern or hotel keeper, or person licensed to sell liquor, constitutes no offence against this section of the statute, and is not therefore unlawful. Other sections of this statute prohibit the sale of liquors, without a license, under a penalty of \$50 (§ 13), and a like penalty is imposed by section fourteen on any person who shall sell liquor to be drank on his premises, or permit liquor sold by him to be drank on his premises, without having obtained a license therefor as an inn, tavern or hotel keeper. Offences against these sections are punishable by the infliction of a money penalty, and have no application or bearing on this case. We are therefore of the opinion that the facts stated in the indictment do not show that the defendant has committed

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any offence against the provisions of this act, and that the defendant was properly discharged.

Another point was taken on the argument, that the defendant could not legally be indicted by the grand jury, without first having been taken before a magistrate. In this we think the counsel for the defendant is mistaken. We have already seen in what case and for what purpose a person offending may be taken before a magistrate. There is no doubt that an offender may be taken before a magistrate in the first instance, who, if satisfied the offence has been committed, is bound to detain the offender in default of bail. But we think the injunctions of section twenty-nine contemplate something in addition, to insure the due execution of this law. By this section it is made the duty of all courts, in which grand juries are summoned, to instruct them to inquire into all offences against the provisions of that act, and to present all offenders under this act. We do not think the legislature meant by this to impose this duty upon the courts and grand jurors, merely for the purpose of instituting an inquiry and informing the court who had violated the law. On the contrary, we think the language used contemplated an inquiry by the grand jury into all offences committed against the provisions of this act, and if on inquiry they shall ascertain such offences have been committed, they are to present all such offenders to the court by indictment. This is the usual, well known and long established manner of presenting offenders to the court by grand jurors. The oath taken by any grand juror embodies this idea. He is well and truly to inquire and true presentment make of all matters given him in charge, to present no man through fear, favor, &c., or to leave any man unrepresented through affection or hope of reward, but to present all things truly as the same shall come to his knowledge. The grand jury present all offenders to the county by indictment; and we think it clear that the legislature intended, if the grand jury should find on inquiry that

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offences had been committed against this statute, the offenders were to be presented to the court by indictment. Any other presentment of offenders would be unmeaning and ineffectual, and would serve no other purpose than that of giving notice to the party accused of the charge preferred, and affording him an opportunity of escape. No principle applicable to the construction of statutes with which we are acquainted would authorize us to sanction a construction which would so effectually prevent the punishment of offenders against its provisions.

The writing which contains the accusation of the grand jury is called a presentment. (2 *Bow. L. Dict.*, 372.)

It is made the duty of the grand jury to inquire into all offences against the provisions of this act. If the act had stopped here, and not added what they should do thereafter, there can be no doubt, we think, that they would equally have been bound to present by indictment all offenders against the act. A reference to similar provisions in our statutes will show that such is the uniform construction which has been given to them, and offenders against which have been presented by indictment. By section fifteen of title seven, part one, chapter six of the Revised Statutes, it is made the duty of the presiding judge of any Court of Oyer and Terminer, or Sessions, within this state, specially to charge the grand jury, at each term of the court, to take notice of all offences committed in violation of any of the provisions of that act. So also by section fifty-four (1. *R. S.*, 672) it is declared to be the duty of such presiding judge of said courts specially to charge any grand jury to inquire into all violations of the laws against lotteries. So also by section sixteen (1 *R. S.*, 773) it is made the duty of all courts of justice to charge the grand jury specially to inquire into any violations of the provisions of that act, the statute against usury. It is also made the duty of any court, to which a grand jury shall be summoned, to charge such jury specially to inquire into any violation of law by

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public officers, in taking fees to which they are not entitled by law (*Laws of 1847, ch. 455, § 17.*)

For what purpose, but for the grand jury to present offenders by indictment, is it made the duty of the courts to require them to make their inquiries? It has certainly always been understood, that grand juries have been instituted for the sole purpose of detecting crime, and insuring its punishment, and that the mandate of the statute upon the courts and grand juries to institute these investigations, carried with it the obligation, upon the latter, to indict in all cases where it was proved offences had been committed. We think therefore, that it is the duty of the courts to charge the grand juries to inquire into all offences against this act, and if they find any such to have been committed the grand jury is bound to present the offender by indictment, to the end that such punishment may be awarded as the law demands.

The order of the recorder in this case is affirmed.

Order affirmed.

SUPREME COURT. Broome General Term, January, 1858. *Gray, Mason and Balcom* Justices.

CHARLES B. GOODRICH, plaintiff in error v. THE PEOPLE, defendants in error.

Where an indictment for selling unwholesome beef charged that the defendant sold the beef in question to divers citizens "as good and wholesome beef and food," it was held to be a sufficient averment that it was sold to such citizens, to be eaten by them. *MASON J.*, dissenting.

And it is no defect in such an indictment that the persons are not named to whom the beef was sold, if it is alleged in the indictment that such persons were "to the jurors unknown."

Nor is it necessary to allege in such an indictment that the defendant intended to injure the health of the persons who ate the beef, or that it did injure their health.

What is a sufficient averment of time and place in such an indictment.

To sustain an indictment for this offence, against a person who had owned a diseased cow and had slaughtered her and sold her for food, it is enough to prove that the disease was known to the defendant and that the nature and tendency of the disease was such as to taint and affect the flesh of the entire animal so as to make it unwholesome in any degree, although the taint was imperceptible to the senses and although the eating of the flesh produced no apparent injury to those who ate it.

On the trial of such an indictment, it is competent to prove what was said to the defendant before he sold the beef, by a third person, on the subject of the unwholesomeness of the beef for food, though no response was made by the defendant, such evidence being proper on the question whether the defendant knew or believed that the meat was bad when he disposed of it.

It is proper on such a trial to prove by physicians that the eating of diseased and unwholesome meats does not always cause apparent sickness and also for physicians to give their opinion of the nature of the disease of which the cow died, founded on the descriptions which other witnesses had given of the ulcerated condition of the animal and also to state whether, in their opinion, the disease would cause fever, and whether the flesh of animals laboring under a fever is unwholesome for food.

WRIT of error to the Tioga sessions, to remove into this court an indictment against the defendant and the record of his conviction thereon for selling unwholesome beef.

The indictment was found in the Oyer and Terminer, and was sent to the Sessions for the trial of the defendant thereon; and it was in the words following, to wit:

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Court of Oyer and Terminer in and for the county of Tioga :

At a Court of Oyer and Terminer held in and for the county of Tioga, at the court house in the village of Owego, on the third Monday of February in the year of our Lord one thousand eight hundred and fifty-seven.

Present, Hon. Hiram Gray, a justice of the Supreme Court presiding judge of the said Court of Oyer and Terminer ; Hon. Stephen Strong, county judge of the said county, and John L. Howell and Nathaniel F. Moore justices of the peace in and for the county of Tioga, duly designated as members of the Court of Sessions in and for the said county of Tioga.

The jurors of the people of the state of New-York, in and for the body of the county of Tioga, to wit : [the names of twenty-three jurors were here given] good and lawful men of the county of Tioga ; then and there being duly sworn and charged to inquire for the people of the state of New-York, in and for the body of the county of Tioga upon their oath.

Tioga County, ss. :

The jurors of the people of the state of New-York, in and for the body of the county of Tioga, upon their oath aforesaid, do present, that Charles B. Goodrich, late of the town of ———, on the twentieth day of December, in the year of our Lord one thousand eight hundred and fifty-six, at the town of Owego in said county, knowingly, willfully, deceitfully and maliciously, did expose to sale and did sell to divers citizens of the state of New-York, to the jurors aforesaid unknown, divers, to wit : five hundred pounds of beef as good and wholesome beef and food, and then and there delivered said beef to the said divers citizens aforesaid : whereas in truth and in fact the said beef was not good and wholesome beef and food, but on the contrary thereof was unwholesome and diseased, and unfit for food, and not fit to be eaten by man, he, the said Charles B. Goodrich, then and

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there well knowing the said beef to be diseased and unwholesome and not fit to be eaten as aforesaid, against the peace of the people of the state of New-York and their laws and their dignity, and against the form of the statute in such case made and provided.

B. F. TRACY,
District Attorney.

The following objections were raised to the indictment, on the trial, and by motion in arrest of judgment, by the defendant's counsel: First. That there was no evil intent alleged in it. Secondly. That the words "then and there" were omitted before the words "good and wholesome beef fit for food," and that the words "then and there" were omitted before the words "unwholesome and diseased and unfit for food and not fit to be eaten by man;" and that the words "then and there" were omitted in another part of the indictment before the words "diseased and unwholesome and not fit to be eaten." Thirdly. That there was no allegation in the indictment that the beef was sold for food and with the intent that it should be eaten. Fourthly. That the general allegation that it was sold to divers citizens of the state, &c., was not sufficiently definite and certain. Fifthly. That there was no allegation in the indictment that the beef had been used as food by man and produced injurious effects and proved unwholesome; or that if it had been used for food it would have been likely to have produced injurious effects.

The Court of Sessions overruled the objections and held the indictment good, and refused to discharge the defendant without a trial, and refused to arrest the judgment after the jury had found the defendant guilty. The defendant by his counsel duly excepted to the decisions of the court.

It was proved upon the trial that the defendant had a cow which was troubled with a large filthy sore on her head, in and about one eye; that he killed her, and sold the meat to

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different persons in Owego ; but there was no evidence given that the meat made any of the persons apparently sick who ate of it. When the cow was slaughtered the sore was from four to six inches in length, and as the cow fell down the eye burst open and the sore discharged so much and such foul matter that it made a man, who was assisting the defendant in dressing the cow, "sick at the stomach." The defendant had "doctored" the sore for several months before he killed the cow and it grew worse all the time, and there was evidence that she had lost flesh by reason of the sore.

A witness for the people was permitted to testify that just before the cow was killed by the defendant or soon afterwards, and before the defendant sold the beef, he heard the defendant's wife say to the defendant "that she would not like to cook any of the meat in the house, if she did she would not like to eat it ; she would think of the eye when she ate it ; that she did not know but the meat was just as good as any." The witness said he did not know that the defendant said any thing in reply to what his wife said.

The evidence of what the defendant's wife said was objected to, and each and every part thereof, by the defendant's counsel, as immaterial and irrelevant, and that the defendant was not bound by her declarations. The court overruled the objection, and the defendant's counsel excepted to the decision.

The district attorney put to two physicians the following question, viz.: "Does the fact that the meat was eaten with apparent impunity, and no obvious ill effects produced, prove that it was not unwholesome food?"

The question was objected to by the defendant's counsel on several grounds, but the court overruled them and permitted the physicians to answer the question, and the defendant's counsel excepted.

Their answers were : First. "The fact that the meat was eaten with apparent impunity, and no obvious ill effects

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produced, does not prove that it was not unwholesome food;" Second. "The fact that unwholesome food is sometimes eaten with impunity does not necessarily prove anything as to the wholesomeness or unwholesomeness of the food."

The physicians gave other evidence, which is noticed in the opinion of the court.

The court charged the jury, if they believed from the evidence that the cow was diseased, that the disease was known to the defendant, and that the nature and tendency of the disease was such as to taint and affect the flesh of the entire animal in any degree, although the taint was imperceptible to the senses, and although the eating of the flesh produced no apparent injury to those who ate it, still, as the probable consequence of eating the flesh of unhealthy and diseased animals may be highly injurious, the defendant was guilty of the offence set out in the indictment.

The defendant's counsel excepted to each and every part of the charge, and he requested the court to charge the following propositions, to wit:

First. That in order to convict the defendant of the offence charged against him, he must be shown to be a person of skill, in order to have a guilty knowledge that a disease located in and about the head would render the body of the animal diseased and unwholesome for food.

Secondly. That guilty knowledge of the disease in the head or extremity is not presumptive evidence of guilty knowledge that the meat was unwholesome for food.

Thirdly. That the knowledge of a sore upon the head does not necessarily imply guilty knowledge of a disease in the body or meat which was sold for food that would render the meat unwholesome.

The court declined to charge in manner and form as requested, and stated that the court supposed that the charge given embraced the whole law applicable to the case.

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The counsel for the defendant excepted "to the above ruling and decision of the court."

The court sentenced the defendant to pay a fine of \$75, and stand committed until the fine was paid.

B. F. Tracy (District Attorney), for the people.

N. W. Davis, for the defendant.

By the Court, BALCOM, J.—Blackstone says: "The selling of unwholesome provisions" is an offence against public health. (4 *Bl. Com.*, 162.) It is laid down by Russell "that the public health may be injured by selling unwholesome food." (1 *Russ. on Cr.*, 115.) This author again mentions "the selling of unwholesome provisions" as an indictable offence, and remarks: "It is said, more largely, that the giving of any person unwholesome victuals, not fit for man to eat, *lucri causa*, or from malice and deceit, is undoubtedly, in itself, an indictable offence." (2 *Russ. on Cr.*, 286.) The same principle is stated by Roscoe. (*Rosc. Cr. Ev.*, 379, 4th *Am. ed.*, from 3d *Lond. ed.*) Roscoe further says: "It is a nuisance for a common dealer in provisions to sell unwholesome food, or to mix noxious ingredients in the provisions which he sells." (*Id.*, 797.) Wharton enumerates "the selling of unwholesome provisions" among misdemeanors. (*Whart. Am. Cr. L.*, 36.) Barbour remarks that "selling unwholesome provisions is a misdemeanor at common law." (*Barb. Cr. Tr.*, 223.)

The indictment in *Treeces' case* charged the sale of five hundred pounds weight of unwholesome bread, "to be eaten as food." (2 *Russ. on Cr.*, 286; 2 *Chit. Cr. L.*, 558.) In *Dixon's case* the allegation in the indictment was, that the defendant, a baker, supplied to the Royal Military Asylum, as and for good wholesome bread, divers loaves mixed with certain noxious ingredients not fit for the food of man, which he well knew so to be at the time he so supplied them.

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Dixon was convicted, and his conviction was affirmed *in banc*. (*Rex v. Dixon*, 4 *Camp.*, 12; 2 *Russ. on Cr.*, 287; 2 *Chit. Cr. L.*, 559.)

Indictments have been held good which stated the sale and delivery of unwholesome bread to C. D., for the use and supply of himself and others. (2 *Chit. Cr. L.*, 556, &c.) In one case, the objection was taken to the indictment, on a motion in arrest of judgment, that it did not specify that the unwholesome loaves of bread were delivered "to be eaten," and the court held that the allegation that the loaves were delivered for the use and supply of children must mean that they were delivered for their eating. (4 *Russ. on Cr.*, 116.)

The statement in the indictment in this case that the defendant sold the beef to divers citizens "as good and wholesome beef and food," means that he sold it to such citizens to be eaten by them. It would be absurd to hold that the language of the indictment authorizes the conclusion that such citizens may have purchased the beef for their dogs, or for any purpose except for themselves or families to eat; and no inference can be "spelled out of" the indictment that the defendant intended to sell the beef to be applied to any use, by the purchasers, other than food for themselves or their families.

The evil intent of the defendant in making the sale, and the time and place in which he made it, are sufficiently averred in the indictment. It is true that the form of the indictment might be improved, but still it is sufficient to uphold the conviction on it. The indictment is not defective because the persons are not named in it to whom the defendant sold the beef, for they were unknown to the jurors. (2 *Chit. Cr. L.*, 556); and it was not necessary to set forth what rendered the beef unwholesome, or to state that the defendant intended to injure the health of the persons who ate it, or that it did injure their health. (2 *East P. C.*, 822. 3 *Maul. & Sel.*, 16.)

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What the defendant's wife said to him about the unwholesomeness of the meat did not tend to establish the fact that it was unwholesome; but it was competent evidence to show that the defendant's attention was called to the condition of the meat before he sold it. It proved very little any way; but it was nevertheless competent evidence on the question whether the defendant knew or believed the meat was bad when he disposed of it.

The questions put to the two physicians were unobjectionable. It was proper for the people to establish that the eating of diseased meat does not always cause apparent sickness. It was also proper for them to give their opinions, from the description which other witnesses gave of the sore on the cow's head, as to the nature of the disease which the cow had, and that it would cause fever, and that the flesh of animals laboring under a fever is unwholesome.

The charge of the court to the jury was substantially correct. I am aware that the broad proposition is asserted by Wharton, that "to support an indictment for knowingly selling unwholesome provisions, the provisions sold must be in such a state as that, if eaten, they would, by their noxious, unwholesome and deleterious qualities, have affected the health of those who were to have consumed them" (*Whart. Am. Cr. L.*, 701); and I shall not attempt to controvert this proposition, nor does the charge of the court conflict with it. As I understand the evidence of the physicians, the eating of diseased meat, although it produces no obvious ill effects, does in reality injure the health of those who consume it. The jury must have understood from the charge that they could not convict the defendant unless the meat was in such a state as to injuriously affect the health of those who ate it, but that it was not necessary to his conviction that the injury should be apparent to the senses, if the medical testimony satisfied them that it did or would injure the health of those who partook of it, provided the defendant knew the cow was diseased from which the meat was

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taken. And this construction of the charge is in harmony with the proposition laid down by Wharton.

Dealers in tainted provisions have no right to palm off their noxious articles until they have prostrated those who eat them by actual sickness. The people must be protected against the sale of unwholesome provisions by the punishment of persons who deal in them, though nobody be made apparently sick by eating them.

The fact that no person was affected injuriously by eating the beef which the defendant sold, was strong evidence that it was wholesome, but it was not conclusive; and this court cannot say but that the jury gave due weight to it in determining the case.

The court did not err in refusing to adopt the three propositions which the defendant's counsel insisted should be stated to the jury as legal rules to govern them in determining the case. Nor was the court bound to mention them as pertinent suggestions in regard to the questions of fact in the case. The facts were probably discussed before the jury sufficiently by the defendant's counsel; at least, such is the presumption; and the court did not err in the opinion that the charge, as made, embraced the whole law applicable to the case.

The facts that the cow was diseased, and that the defendant knew it, were undisputed; and the presumption is that no part of an animal that is rotten with disease in any place is fit food for man to eat.

The defendant sold the meat of the cow after his wife had told him she would not like to cook it or eat it, and he took the risk upon himself that it was wholesome, when he disposed of it, knowing that it came from a diseased cow. (*Rex v. Dixon, 4 Camp., 12.*)

The verdict was not against evidence. The defendant was rightfully convicted; and his conviction and sentence should be affirmed.

The following dissenting opinion was delivered by

MASON, J.—The charge of the court below was right. If the nature and tendency of the disease was such as to taint and affect the flesh of the entire animal in any degree, and this was known to the defendant, he was guilty of a misdemeanor in selling it to persons to be eaten by them; for, if the unwholesome food may be injurious to the health of those who eat it, that is sufficient. It is not necessary that it actually should have proved injurious to the health of those who consumed it.

I am inclined to think, however, that the court below should have arrested the judgment, on the ground that the indictment fails to charge a criminal offence.

The security of the accused requires precision and certainty in a criminal pleading, and will not admit anything to be taken by intendment. (6 *Metc.*, 264.) As I understand the law, to constitute the criminal offence of selling unwholesome meat it is necessary that it be sold for the food of man, or for his use as food; and it is necessary to aver in the indictment that the unwholesome article was sold for the food of man, or some other equivalent allegation, showing that it was sold for the use of a person or persons to be eaten as food. The indictment in the case at bar does not contain such an allegation. It alleges that the defendant did sell to divers citizens of the state, to the jurors unknown, divers to wit, five hundred pounds of beef as good and wholesome beef and food, and then and there delivered the same, &c. This is not an averment that it was sold for the use of any of these divers citizens as food, or that it was designed, either by the seller or buyer, that they should use it as food for themselves or in their families. This indictment is not sufficient, in my judgment, to sustain the conviction. There is no averment that the beef was sold to these persons to be consumed as food, and consequently the indictment does not charge a criminal offence. (*Moses v.*

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Mead, 1 *Denio*, 387; 3 *Maule & Sel.*, 11; 2 *East P. C.*, 821; 4 *Camp.*, 11; 3 *John. Cas.*, 265, 267; *The State v. Norton*, 2 *Ire.*, 40; 2 *Hale P. C.*, 165.)

The judgment of the Court of Sessions should be reversed, and judgment on the verdict of conviction be arrested on this ground.

GRAY, J., concurred in the conclusions arrived at by Justice Balcom, and the judgment of the Tioga Sessions was thereupon affirmed.

SUPREME COURT. New-York General Term, February, 1858.
Davies, Clarke and Sutherland, Justices.

JAMES ROGERS, plaintiff in error, v. THE PEOPLE,
 defendants in error.

The act of 1855 gives to the Supreme Court the power, on writ of error, to grant a new trial where the verdict is against the weight of evidence.

On a trial for murder, where the intention of the prisoner is sought to be ascertained for the purpose of determining whether the offence is murder or manslaughter, the jury are authorized to take into consideration the intoxication of the prisoner, as bearing upon the question of intent.

And where, on such a trial, the prisoner's counsel requested the court to charge "that if it appeared by the evidence that the condition of the prisoner from intoxication was such as to show that there was no intent or motive to commit the crime of murder, that the jury should find a verdict of manslaughter," and the court refused so to charge, a new trial was granted.

Though, it is true, that if a man voluntarily make himself drunk, his drunkenness is no excuse for any crime he may commit while so intoxicated, yet, in homicides of different degrees according to intent, and in larcenies, forgeries and other crimes depending on intent or knowledge, the intoxication of the prisoner is, in many cases, a material circumstance for the consideration of the jury.

THIS case came up on writ of error to the Court of General Sessions of the city and county of New-York.

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The plaintiff in error had been indicted in that court for the murder of John Swanston, and pleaded not guilty. The issue was tried before the city judge in November, 1857, when the following evidence was given :

Eben Hassel, M. D., was called and sworn as a witness for the prosecution, who testified as follows : I am a physician, residing at No. 71 West Thirty-seventh-street ; I made the *post mortem* examination on the body of the deceased, John Swanston, at his late residence ; I found the wound to be an incised wound, inflicted with a sharp instrument ; the wound was not less than three inches in depth ; the wound was situated on the junction of the fifth rib with the breast bone, and the artery of the heart was penetrated ; I should judge that the wound was inflicted with a large dirk knife, and was the cause of death.

On being *cross-examined* he further testified : I am certain the depth of the wound was not less than three inches ; there were no other wounds on the body ; the deceased was a medium sized man, about five feet eight or nine inches high ; the wound was upward and inward tending toward the left ; it is very probable that the blow was struck from the right side ; it was my opinion from the character of the wound, that it was inflicted with a dirk knife.

Margaret Swanston was next called and sworn as a witness for the prosecution, and testified as follows : I am the wife of deceased ; on Saturday night, the 18th of October, 1857, was out with my husband ; had been to market and was returning ; my husband and myself were coming down Twenty-first-street, the upper side toward Tenth-avenue ; I was leaning against my husband's left side ; he had a lantern not lighted in his right hand ; I was on his left side ; before we turned the corner we heard words of loud talking, like persons quarreling ; it was not a great way from the corner ; I was on the inside on Twenty-first-street, and as we turned the corner, I was toward the boys ; we were going

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home to Twenty-seventh-street, between Tenth and Eleventh avenues; we were going straight ahead to cross the avenue, when the young men shouldered me; they came against me and pushed me against my husband; the young man who afterwards struck the blow, asked my husband what he was saying; my husband answered, "what is that to you;" one of the men that was with him said, "they are not talking to you;" they had then passed us; my husband turned his head toward them, and they turned to come back, and we turned, and they faced us, and the young man who struck the blow was held by the other two; he broke away from them, sprang straight up, and struck at my husband, and aimed the blow at his breast, and then ran straight on up the avenue; it was on the cross-walk of the avenue where the blow was struck, about a yard from the curb; as we turned they were close upon us; my husband, as soon as he was struck, cried, "I am murdered," and ran as far as the curb; I never saw them before.

On being *cross-examined* by the prisoner's counsel, the witness further testified: The killing was on the Tenth-avenue, on Saturday evening; could not say the day of the month; we came down Twenty-first-street, from Ninth-avenue, toward the Tenth-avenue; we turned to go up Tenth-avenue, homewards; we went up the east side of the Tenth-avenue; I could not say where we were exactly; when we heard the noise, were approaching Tenth-avenue; when we got to the corner, the boys came right upon us; they shouldered me in passing; it was intentional, their pushing against me; could not say how hard they hit us; they were three abreast walking down, and speaking loud as if excited, angry and quarreling; my husband spoke to them when I was hit; the other two said, "he is talking to his wife, and not to you;" cant say how far they got when they turned back; my husband spoke to them; we might have been a yard or two in the street, at the time they came up; I was on the inside coming down Twenty-first-street; dont know whether

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I would be on the north side ; I was on my husband's right on the Tenth-avenue ; they did not come up to me ; approached my husband first ; my husband partially turned round ; the three were together ; one struck my husband, and made off ; the whole three were close upon us, when my husband was struck ; it was a dark night ; I think it rained ; it was cloudy ; I could see the three ; dont know that I could pick out any of the three ; did not see his features ; did not know the accused ; never saw him before.

By the Prosecution. Can describe the color of the coat of the one who struck the blow ; he had on a dirty drab ; it was close on ten o'clock, P. M. ; I could not say my husband was dead when I went up to him ; he fell on his face.

Robert Rae was then called and sworn for the prosecution, who testified : He is a physician ; lives second door in Tenth-avenue, from the corner of Twenty-first-street ; on the Saturday night in question I was in my room, the front one, when I heard the cry of murder ; I raised my window, saw three young men ; two of them were together ; they were running down the Tenth-avenue ; the third one I saw best ; he was eight or ten steps behind the other two ; he was the largest of the three ; he had on a drab coat, dark pantaloons ; I saw the deceased lying on the street ; he had fallen before I saw him ; as soon as I heard the cry I raised the window ; I saw the deceased ; he was quite dead when I went across to where he lay ; it was about five minutes after I heard the cry ; the three young men ran ; the last one with drab coat ran very fast.

On *cross-examination*, witness says : I was not acquainted with deceased ; the coat the third boy had on when running was a drab coat like a fireman's coat ; he also had on a cap ; all three had on caps.

Daniel Cunningham was sworn as a witness for the prosecution, who testified as follows ; I live on the Tenth-avenue, between Sixteenth and Seventeenth streets ; know the pri-

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soner; knew him about two weeks before the murder; on this Saturday night I met him and McGivney coming up Seventeenth-street near Eighth-avenue, from the Ninth-avenue; Rogers had on a light coat, drab, like a fireman's; also a cap; he is the largest of the three; this was about eight o'clock; he asked me to have a drink; we first went down Seventeenth-street, between Eighth and Ninth avenues, and took some beer; we stayed there five minutes, and then went up Eighth-avenue, and stopped at Twenty-fourth-street five or ten minutes; then to Twenty-fifth-street, and took some more beer; then to Tenth-avenue and Twenty-sixth-street; Rogers wanted to go down Twenty-sixth-street, but McGivney would not go; we turned down then to Twenty-second-street and met a boy; Rogers asked him for a piece of an apple; the boy said he had but one, and fired the apple at him, and Rogers run after him; we then went across the street and down the avenue as far as Twenty-first-street, on the side towards Ninth-avenue; we were walking along; Rogers was drunk, and we were trying to get him home; the man and woman were coming down, and Rogers staggered up against him; he knocked against the woman, and the man turned round and made some remark; McGivney told the man not to mind Rogers, he was drunk; the man made a crack at Rogers; the blow went over his head; they got in a fight, and we took Rogers away; he was stronger than we, and got away from us; Rogers hit the man as well as he could; he struck him about the body; this was in the street; Rogers ran away first; did not see Rogers have anything in his hand; I saw Rogers leave the man; the man screamed murder right away; I did not see Rogers have a weapon that night, or a knife; he went up town; we down; did not see him after until I saw him in the Tomba.

On being *cross-examined*, witness further testified: I was arrested the Tuesday morning after; the policeman who arrested me, told me I would not be prosecuted if I testified

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here ; and that I must tell the truth ; I did not know a man was killed till the next day, and went out as usual ; Rogers hit against the woman, and Swanston asked what he did that for, and then the fight commenced ; we drank about two times that night ; don't know how many times Rogers drank.

Clark S. Dunning was then called as a witness, and sworn for the prosecution, who testified : I reside at 169 Tenth-avenue, west side, second door from Twenty-first-street ; I heard the cry of murder ; was in front room ; had raised the window to adjust the blinds, to let the lamp-light in ; my attention was called by the cry of murder ; I saw a man, woman and three boys or young men ; the man or woman had a basket and lantern not lighted ; the boys passed down the Tenth-avenue, east side ; one was larger than the others, and had on a dirty drab coat and red shirt ; he was the largest ; when I saw the boys, he was seven or eight steps from them ; these were all the persons in the street at the time ; I saw the tallest boy near the man ; the man fell almost immediately, before he could have gone twenty-five feet ; the two in black then passed down the avenue, and the tallest boy made a circuit up and across the street, and I lost sight of him behind some wagons ; before the cry of murder I noticed the boys ; there were no other persons in the street ; as soon as the cry of murder the large boy appeared to have been in contact with the man ; largest was nearest the man ; the small boy said, " Don't meddle with the man ; " I saw the large boy's hand come from breast of deceased, as if he had struck a blow ; the two smaller boys passed down Tenth-avenue, and I lost sight of them ; the largest boy was a few steps behind ; saw the deceased fall after he went a few steps ; I went out immediately ; the boys ran fast ; it would have been impossible for me to catch them ; they did not appear to be intoxicated ; the largest boy passed off the sidewalk and made a circuit round a wagon, and I lost sight of him.

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On being *cross-examined*, he said: I am almost opposite the street lamp; it is on the east side, fifty-five or sixty feet from the corner north; my house is also north of the corner; the deceased was very near the corner; the three boys were together on the sidewalk near the corner; they appeared to be passing down the avenue; the man and woman were near the corner; did not see them more than a minute before the cry; I saw a motion of the tallest boy's hand as if he were striking; saw no blows struck; the motion was like a swing of the hand; did not watch their motions all the time; I thought he had stabbed him; I saw the motion made as if he had stabbed him before the cry of murder, and I cried murder before deceased hallooed out.

David Scott was then called and sworn as a witness for the prosecution, who said: I heard the cry of murder that night; saw the boys; saw them ten minutes before the cry of murder; Rogers was the largest boy; he had on a drab and coat, black pants and cap and red shirt; when the tallest boy asked me for a piece of an apple, he tried to get something out of his pocket; I saw the handle of a knife about seven or eight minutes, before the cry of murder, as he (Rogers) tried to get it out of his pocket; Rogers took his hand out of his pocket, and ran after me; I am the boy he asked for the apple.

The prisoner's counsel objected to the evidence of this witness as immaterial and irrelevant; the court overruled the objection, and the counsel excepted.

On being *cross-examined*, he said: This was on the corner of Twenty-second-street and Tenth-avenue; I was standing in the door; he asked me for the apple and struck me, and I threw the apple at him; he dared me to come out; the boys took him away; he broke away from them; he was taking his hand out of his pocket; did not see the blade; it looked like a gray handled jack-knife; did not see them before; Rogers talked as if he were a little drunk.

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Stephen McGinney was then called and sworn for the prosecution, who said: I am nineteen years old; have known Rogers for about eleven months; met him that night about half-past six o'clock, on Tenth-avenue, near Sixteenth-street; we afterwards went up to the corner of Tenth-avenue and Twenty-second-street; we met a boy, and Rogers asked him for a piece of apple; the boy said it was the only one he had, and Rogers made a kick at him, and then we went down toward Twenty-first-street; we met a man and woman coming down Twenty-first-street; Rogers bumped against the woman; they were stepping across the curb; the man turned around and asked him what he did it for; I told the man to excuse Rogers as he was drunk, and we took hold of him, but he (Rogers) said he wanted to fight, he would not be excused; we then let go of him, and he then went up to the man, and they both got scolding; I was about ten feet off; I saw the man make a crack at Rogers, which did not hit him, but went over his head, and Rogers made a crack back and hit him; then the man struck Rogers, and Rogers hit the man again, and in a second I heard the cry by the man of murder, he putting his hand to his breast; we stood still, and the man ran after Rogers; did not see Rogers after that until Sunday night; met him at his house in Twelfth-street; it was about eight in the evening; saw him about fifteen minutes; he was in the bed-room, sitting on the bed; I did not see him have anything in his hand on the night of the murder; Rogers on that night had on a drab coat, red shirt, dark pantaloons; I had a lilac shirt on, and was dressed as I am now.

On being *cross-examined*, he said: We drank twice that night; Rogers was drunk, and we were helping him home; he staggered a little; he said to me, "Here comes some bad woman;" he was on the end as we walked; we were making a noise, and he was hallooing; when the blows were struck I was about ten feet off.

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Inspector Lefferts was called and sworn by the prosecution, and testified: I am attached to the detective force; I arrested Rogers in New Brunswick, New Jersey, the Friday after the murder; I asked him if he was willing to go back to New-York without a requisition from the governor; he said he would; I asked him how he could commit such a crime, and he so young.

Prisoner's counsel objected to the reception of this testimony as improper, and as to any admissions made to the witness.

Witness said on *interlocutory cross-examination*, that he held no process against him; that he took him from the constable at New Brunswick jail; the prisoner came voluntarily.

Witness further stated that he made no threats or promises, and that his admissions were voluntary.

Prisoner's counsel then objected, not that any inducements had been used to extort a confession, but on the general grounds that confession made by a party when under arrest could not be used against him; but the court overruled the objection and admitted the testimony, to which the prisoner's counsel excepted.

He answered, he was drunk; I asked him what the blow was struck with.

Same objection, ruling and exception.

He said it was done with a common pocket knife; that one of the other boys told him the man was dead, and that he had better leave the city, and upon starting he threw away the knife in Twelfth-street; he said he was not in the habit of getting drunk; that the other boys induced him to drink that night.

The prosecution here rested, and the counsel for the prisoner, after stating his case to the court and jury, called as a witness

Catharine Rogers, who, being sworn, testified: I am prisoner's sister; my brother had been at work at Wood-

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bridge, New Jersey, for Mr. Hoover, who is now sick abed at home.

Bridget Rogers, sworn for defence, testified: I am prisoner's mother; about six weeks before this happened he came home from Mr. Hoover's, where he had been at work, sick with the dumb ague; on this Saturday night, he came home about ten o'clock; he was very bad; he fell helpless on the floor; he was so drunk that my daughter and myself had to put him to bed and undress him; he had always been quiet and peaceable before this, staying home mostly; he remained in the house till Sunday night, and after McGivney came to see him, he went away; he never carried a pistol or dirk knife, to my knowledge; only a small pocket knife.

Bridget Rogers called, and sworn for the defence. I am prisoner's sister; don't recollect when he returned from Woodbridge; saw him about two weeks before the murder; he was home every night; he was working in a tin shop; he came home that night near ten o'clock; was so drunk he could not walk; mother and I put him to bed; he left Monday morning; did not see him; did not see him carry anything but a pocket knife; had two small blades; he never was drunk before that night; McGivney was to see him once; the other was not.

Mary Branigan called, and sworn for defence. Don't know prisoner, nor McGivney; know Cunningham; saw Cunningham that night about ten o'clock; saw him first on Twenty-sixth-street and Tenth-avenue; there were a number with him; he was standing still; he stopped my husband and put his foot before him, and would not let him go; they followed us down street; there were three together then; Cunningham walked up to my husband, put his hand in his pocket and took a shilling out, and when I said he had done so, Cunningham struck me, and I was sick for ten days; he took from his pocket a knife, or revolver; it looked like a wide blade of a knife; each of the three then

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ran across the avenue; have known Cunningham about four years; he has a bad character; have known him to lick his mother for four years; never heard him to be honest.

On being *cross-examined*, she said: The other boys said it was a shame for him, Cunningham, to strike a woman; I was excited at the time; I shouted murder at the time; I don't know the prisoner.

After other witnesses had been sworn and testified for the defence, the case was summed up to the jury.

The judge charged the jury that the killing of a human being, without the authority of law, unless it be manslaughter, or excusable or justifiable homicide, is murder when perpetrated from a premeditated design to effect death, and if the intent was formed a minute before the blow was struck, it is willful, deliberate and premeditated killing, as well as if intended for an hour or day.

That manslaughter in the first degree is the killing of a human being, without a design to effect death by the act, procurement or culpable negligence of another, while the prisoner was engaged in the perpetration of any crime or misdemeanor not amounting to felony, or in an attempt to perpetrate such crime or misdemeanor, in such cases where such killing would be murder at the common law.

That manslaughter in the third degree is the killing of another in the heat of passion, without a design to effect death, by a dangerous weapon.

That when the killing is the effect of malice or general depravity, it is murder; and when without malice, express or implied, or without any justification or excuse, it is manslaughter, or when without malice, but caused by sudden passion and heat of blood, it is also manslaughter.

That the first question to be determined by the jury was: Had a murder been committed, if so, by whom; and if from the evidence in the case they should find that the mortal blow was struck by the prisoner; then the next question for them

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to determine was: Whether it was murder, or manslaughter in the first or third degree.

That if, from the evidence, they were satisfied that the prisoner had time to think, and did intend to kill, if he conceived the intent, but on the instant the blow is struck, it is murder. If, on the other hand, the evidence satisfied them that the killing was done without a design to effect death by the act, procurement or culpable negligence of the prisoner, it would be manslaughter in the first degree, while the prisoner was engaged in the perpetration of any crime or misdemeanor not amounting to felony, or in an attempt to perpetrate such crime or misdemeanor, in such cases where such killing would be murder at the common law.

And if they were satisfied that the mortal blow was struck in the heat of passion, without a design to effect death, by a dangerous weapon, then it would be manslaughter in the third degree.

And that they were to apply the rules of law laid down by the court to the evidence in the case, and find their verdict accordingly.

To which charge the prisoner's counsel duly excepted.

The counsel for the prisoner requested the court to charge that if it appeared by the evidence that the condition of the prisoner from intoxication was such as to show that there was no intention or motive to commit the crime of murder, that the jury should find a verdict of manslaughter; but the court refused to instruct the jury in the words of the proposition, but charged that, under the old law, intoxication was an aggravation of crime; but that intoxication never excused crime, unless it was of the degree to deprive the offender of his reasoning faculties.

To which refusal and charge, the prisoner's counsel excepted.

The jury then retired, and after deliberation, found a verdict of guilty against the prisoner.

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After sentence was pronounced a writ of error was sued out in behalf of the prisoner, and proceedings upon the judgment were stayed by the direction of one of the justices of this court.

E. W. Andrews and *George D. Kellogg*, for the plaintiff in error.

The evidence shows, first, that the prisoner never carried or used any knife except an ordinary pocket knife; second, that at the time of the alleged murder the prisoner was intoxicated to such an extent as to be deprived of his reason and faculties; third, that this intoxication was induced by his companions.

I. The court erred in admitting the testimony of David Scott, because it was immaterial, irrelevant and insufficient, the prosecution endeavoring thereby to connect the prisoner with a knife a short time before the killing; and remote evidence of such a nature, or the proof of collateral matters, should not be allowed to form a link in the chain of testimony. (1 *Greenl. on Ev.*, § 52; *Am. Cr. L.*, § 647; *People v. Wilson*, 2 *Port.*, 511; 2 *Russ. on Cr.*, 772; 2 *Cush.*, 590; *The State v. Stone*, 4 *Humph.*, 27.)

II. The court erred in admitting as evidence the communications of the prisoner to the witness Lefferts because, first, the prisoner was under arrest and in custody at the time, second, the manner of the officer and the form of his questions were improper, and of themselves constituted a threat or intimidation, and would necessarily operate on the fears of the prisoner; third, the admissions are not voluntary within the meaning of the rule, for it is the duty of the officer, and the right of the prisoner, to be informed that his statements might be used in evidence, and only after such caution are admissions voluntary to that extent that they may be used as evidence. (1 *Greenl. Ev.*, §§ 219, 220; *Comb v. Taylor*, 5 *Cush.*, 602; *Am. Cr. L.*, § 685; *The State v.*

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Long, Hayw., 455; *The State v. Deathridge*, 1 *Smeed*, 75; *Rex v. Mills*, 6 *Carr. & Payne*, 146; *Rex v. Jones, Russ. & Ry.*, 151, 152; *Rosc. Cr. Ev.*, 36; *Drew's case*, 8 *Carr. & Payne*, 140; *Regina v. Fleming*, 1 *Armstrong, M. and O. R.*, 330; *Palmer's case*, 16 *Johns.*, 143.)

III. The court erred in the charge because: First. If the prisoner intemperately used an instrument not in its nature a deadly weapon, while intoxicated, such intoxication might induce the jury to less strongly infer a malicious intent. (*Rex v. Makin*, 7 *Carr. & Payne*, 297; 2 *Park. Cr. R.*, 235); Second. When the question of intent or premeditation is concerned, evidence of drunkenness is material in determining the precise degree of guilt (*Pennsylvania v. McFall, Addis.*, 957; *Am. Cr. L.*, §§ 41, 44; *Regina v. Crane*, 8 *Carr. & Payne*, 541; *Regina v. Thomas*, 7 *Id.*, 817; *The State v. Pigman*, 14 *Ohio*, 555; *Hall v. The State*, 11 *Humph.*, 154; *The United States v. Rondenbush*, 1 *Bald.*, 514; *Swan v. The State*, 4 *Humph.*, 136; *The State v. Bullock*, 13 *Alabama*, 413); Third. The intoxication is always to be taken into account, when provocation has been given, as a first blow struck, because a drunken man is more easily excited to passion than a sober one (*Rex v. Thomas*, 7 *Carr. & Payne*, 817; *McFall's case, Addis.*, 257; *McCant's case*, 1 *Speers*, 384; *Cornell's case, Martin & Y.*, 147; *Swan's case*, 4 *Humph.*, 136; 3 *Am. Jur.*, 1-20; 3 *Greenl. Ev.*, §§ 6, 148); Fourth. The intoxication of Rogers was of the degree of "inculpable," justly attributable to others; or, as Hale (p. 632) expresses, "the contrivance of evil minded persons." (3 *Greenl. Ev.*, § 6; 2 *id.*, 359, note); Fifth. The whole conduct of Rogers, on the night in question, was that of a boy maddened by liquor, to which he was unused, not voluntarily, but "inculpable," and his conduct that of a madman without purpose or motive; Sixth. The common law characteristics of murder are preserved, except when altered by statute. Our statutes have substituted "premeditated design to effect death" for "malice aforethought," but as to the

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person and status, the language of the elder style prevails, as when a man of sound sense, &c. (*Coke's definition*, "Murder;" *Rex v. Hough*, 1 *Leach*, 368; *The People v. Mann*, *MSS. case, by the Court of Appeals, Brown, J.*); Seventh. The court erred in limiting the intoxication to a total deprivation of reason by reason of it; whereas, if it clouds the reason, and a party assailed uses a weapon and kills his adversary, his offence is only manslaughter (2 *Bishop Cr. L.*, § 632; *Ray's Med. Jur.*, § 445; 8 *Carr. & Payne*, 541).

IV. The verdict is against the evidence, because it appears that the death of Swanston was caused in mutual combat; that the mortal blow was struck in the heat of passion, and without any premeditated design to kill. (*Am. Cr. L.*, 988; 1 *East P. C.*, 243, 244; 1 *Carr. & Payne*, 437; *Commonwealth v. Daly*, 4 *Penn. L. Jour.*; *The People v. Clark*, 3 *Seld.*, 385; *The People v. Sullivan*, *id.*, 396; *The People v. Johnson*, 1 *Park. Cr. R.*, 154, 298; *The People v. Curtis*, *id.*, 154; 1 *Russ. on Cr.*, 707; *Horton on Homicide*, 197; *The State v. Ferguson*, 2 *Hill*; *South Carolina*, 619; *The State v. Law*, 4 *Indiana*, 113; *Stewart v. The State*, 1 *Ohio*, 66; 3 *Greenl. on Ev.*, § 121.)

P. B. Sweeny (District Attorney), for the people.

I. The verdict of the jury was not against the weight of evidence.

II. The verdict against the prisoner was not against law. This point involves the consideration, first, of the objections to testimony on the part of the prisoner; second, of the judge's charge to the jury and the exceptions thereto.

First. As to the objections to testimony.

1. The testimony of David Scott, the boy from whom the prisoner asked the apple, and upon whom he threatened or attempted to draw the knife, was competent. It showed three important facts: first, that the prisoner had a knife; second, that he was not helplessly drunk, for he ran after this boy,

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and, third, the disorderly character of the conduct of the prisoner a few moments before the affray in question, and that he was not waiting for provocation, but that he was making or courting it, relying upon his knife. 2. The testimony of Inspector Lefferts as to the confessions of the prisoner at the time of his arrest, was properly received. It was proved, and even admitted by the prisoner's counsel, that they had not been extorted from the prisoner. The mere fact of his being under arrest did not render the confessions improper. (*The People v. McMahon*, 2 Park. Cr. R., 663; *The People v. Hendrickson*, 1 id., 406, 416.)

Second. As to the judge's charge to the jury, and the exceptions thereto. The charge distinctly put it to the jury that, without an intent to kill, the prisoner could not be convicted of murder. This was done in two different instances. In rendering their verdict the jury have found that the prisoner had such an intent at the time of the commission of the act. The charge is consistent with the law established by the Court of Appeals. (*The People v. Clark*, 3 Seld., 385; *The People v. Sullivan*, id., 396.) The charge is even more favorable to the prisoner upon the point of murder than the law required. It tells the jury that if the prisoner had time to think and then conceived the intent to kill, his act is murder. Without time to think, with the bare intention to kill, by the law as it now stands in this state, his act would be murder.

III. The court did not err in the direction it gave the proposition of the prisoner's counsel in relation to the effect of intoxication upon the prisoner's act. 1. The proposition was inartificially put. It speaks of an intention to commit the crime of murder. The prisoner might have an intention to kill, and his act might thus amount to murder, but he could hardly be said to have the intention to commit murder. Murder is the technical term applied in law to the act embodying such an intent. 2. By convicting of murder, and so finding that the prisoner had the intent to kill, the jury

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found that the prisoner was in a mental mood admitting of such an intent. He could not have the intent, unless he was in a condition to form or conceive it. 3. Drunkenness or intoxication is only a defence where it argues or proves that the mind of a party, from his physical condition, was incapable of conceiving or entertaining an intent to kill; as where a party is so besotted by drink as to be physically and mentally insensible. (*The People v. Hammill*, 2 Park. Cr. R., 223; *The People v. Robinson*, *id.*, 235; *United States v. Drew*, 1 Benn. & Hurd's Lead. Cr. Cas., 113; *Freeman v. The People*, 4 Denio, 9.) 4. The court charged correctly upon the point, in instructing the jury that the drunkenness or intoxication necessary to make out an excuse or defence, must deprive the offender of his reasoning faculties.

IV. Even if there was an error (which clearly is not the fact) in the charge of the court, upon or as to this proposition of the prisoner's counsel, it would not entitle the prisoner to a new trial. There was no testimony in the case to show that at the time the prisoner inflicted the fatal stab, he was in the state suggested in or intimated by the proposition. He may have been desperate, but he was not unconscious or insensible from drink. Excited by liquor, and emboldened by or relying upon his knife, he may have been reckless of consequences, but he was still in a condition to be both susceptible of motive and capable of intention. His conduct not only exhibits consciousness, but the most marked cunning and deliberation. Whether it was because the liquor he had drank had not fully enslaved him at the time he committed his crime, and worked upon him more fully afterwards, or, whether, intermediate the deadly scene and his return home, he had indulged in additional drink, the fatal occurrence points to him as one who was perfectly aware of all he was doing. It is well settled in this state, that an erroneous instruction to the jury, upon an abstract legal proposition, is no ground for interfering with the verdict. It is only of directions, which are applicable or can be

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applied to the facts, that error is predicable. The practice of involving the court, on the trial, in legal abstractions, is not to be countenanced or tolerated. (*Shorter v. The People* 2 *Const.*, 193; *S. C.*, 4 *Barb. S. C. R.*, 460; *The People v. Robinson*, 2 *Park. Cr. R.*, 235.) If the prisoner went into a fight with an unarmed man, relying upon his knife, an English judge would have instructed the jury, if a homicide was the result, that the act was murder. (*Regina v. Smith*, 8 *Carr. & P.* 160.)

• *By the Court*, SUTHERLAND, J.—Although the statute under which this case has been brought here by writ of error, gives this court the power to grant a new trial, if the court were satisfied that the verdict against the prisoner was against the weight of evidence (*Laws of 1855*, p. 613, § 3), yet we cannot say in this case, that the verdict was against the weight of evidence.

According to the testimony of Margaret Swanston, the wife of the deceased, there was no mutual combat, and the fatal blow was struck by Rogers without a blow from her husband. Her testimony is partially confirmed by the witness, Clark S. Dunning.

I cannot say that their testimony did not have and ought not to have had more weight with the jury, than the testimony of the prisoner's two companions, Cunningham and McGivney, although introduced and sworn on the part of the people, who testified that blows passed between the prisoner and the deceased, on the deceased asking the prisoner why he run against his wife.

The jury had the witnesses before them, and could judge better than we can what weight to give their respective testimony.

Nor do I think there was error in admitting the testimony of David Scott, the boy from whom the prisoner asked the apple, a few minutes before his murderous attack upon the deceased; or in admitting the testimony of Inspector Lef-

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ferts as to the confessions of the prisoner at the time he was arrested; as to the testimony of the former, it was certainly important to show that the prisoner had a knife, and what kind of a knife, and the disorderly conduct and reckless spirit of the prisoner but a few minutes before he struck the deceased with some deadly instrument; and as to the testimony of Lefferts, there is nothing but the mere circumstance that the prisoner was under arrest when he made the confession, from which we can infer that they were not voluntary, or made under the influence of a threat, or from intimidation.

But the exceptions of the prisoner to the charge of the court below, and to the refusal of the court to charge as requested by him, deserve consideration.

All the witnesses who speak on the subject agree in saying that the prisoner was excited by drink; his companions, Cunningham and McGivney, say he was drunk; his mother and sister say that he was very drunk. The degree of intoxication is not important in looking at the exceptions of the prisoner.

The counsel for the prisoner requested the court to charge "that if it appeared by the evidence that the condition of the prisoner from intoxication was such as to show that there was no intention or motive to commit the crime of murder, that the jury should find a verdict of manslaughter." The court refused to charge as requested, but charged "that under the old law, intoxication was an aggravation of crime, but that intoxication never excused crime unless it was of the degree to deprive the offender of his reasoning faculties."

The prisoner was indicted and tried for murder, and, under an indictment for murder, he could be convicted of either murder or manslaughter.

The deceased was killed by the blow which the prisoner struck with some deadly instrument; deadly, because it produced death. The prisoner said it was a common

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pocket knife; from the evidence of Dr. Hassel, who made the *post mortem* examination, it is probable it was a large knife, or a dirk knife.

The meeting between the prisoner and the deceased, on the occasion when the prisoner stabbed the deceased, was not premeditated; there was no evidence, nor even a pretence that the prisoner knew the deceased, or had ever seen him before; there was nothing other than what took place on the occasion, to show that the prisoner, when he struck the fatal blow, intended to kill the deceased. The attack was sudden, and if the prisoner intended to kill the deceased, that intention was formed on the spot; either when he struck the fatal blow which produced death, or a few moments before.

If the prisoner did intend to kill the deceased when he struck the fatal blow, he was guilty of murder, though his intention or design to kill preceded the blow but an instant. (*The People v. Clark*, 3 *Seld.*, 385; *The People v. Sullivan*, *id.*, 396; 2 *R. S.*, 657, § 5.)

If the prisoner struck the fatal blow in the heat of passion, without the intention or design to kill, he was guilty of one of the degrees of manslaughter only. (2 *R. S.*, 661, §§ 10, 12.)

The whole question was one of intent, to be inferred by the jury from the material circumstances of the case; and every circumstance in the case was material, which the jury was authorized to take into consideration on the question of intent.

Was the intoxication of the prisoner on that occasion a circumstance which the jury were authorized to consider in determining whether the fatal blow was struck with the intention to kill?

We think it was.

The affair was sudden; there was evidence of a mutual combat. The two companions of the prisoner, sworn on the part of the people, testifying that blows passed between

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the prisoner and the deceased, the deceased striking first. All the witnesses, including Mrs. Swanston, agree in saying that, as the prisoner and his companions, in their nocturnal excursion of city rowdyism, accidentally met the deceased and his wife, and rudely came in contact with the person of Mrs. Swanston, the deceased turned around and spoke to them. The prisoner, stopping, says: "What is that you say?" The deceased answers, "What is that to you?" According to Mrs. Swanston's account, the prisoner then broke away from his companions and struck at her husband, aiming the blow at his breast, and then ran up the avenue. According to the account of the prisoner's two companions, blows passed before the fatal blow, as before stated. Mrs. Swanston says, that as the prisoner and his companions were coming down the avenue, approaching her and her husband, "they were three abreast, walking down and speaking loud, as if *excited, angry and quarreling*."

Now we do not say what weight the intoxication of the prisoner and his companions ought to have had with the jury on the question of intent, had that circumstance been submitted to them, with the other circumstances in the case, for their consideration. Nor will we by any means say that had that circumstance been so submitted, we should have felt bound to disturb the verdict, as against the weight of evidence, had they found the prisoner guilty of murder.

But the violent homicide for which the prisoner was tried had different degrees, depending on the intent to kill, or the absence of such intent. The statutory definition of two of the degrees of manslaughter implies not only that a homicide committed in the heat of passion may have been committed without the intention to kill, but also that such heat of passion is likely to prevent the reasoning, calculation, reflection or design implied by a particular intent.

Can any one say that intoxicating drinks taken into the body do not tend to intoxicate the mind, and to inflame the passions? that they do not tend to make anger and other

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revengeful passions more excitable? Can any one say that intoxication does not tend to produce a confusion of mind of material consideration on the question of a specific intent, where, from all the other circumstances in the case, it is evident the intent originated on the spot, but an instant before the blow, or contemporaneously with the will to strike the blow?

All human experience proves the contrary.

No doubt great caution is necessary in the application of this doctrine.

We do not say that it should be applied in any case where there is evidence of premeditation, *aliunde* the circumstances of the affray, or occasion on which the homicide was committed; for we know that it is not unusual for criminals to fortify themselves for crime with liquor. But in homicides of different degrees according to the intent, and in larcenies, forgeries and other crimes, depending on intent or knowledge, in many cases the intoxication of the prisoner is a material circumstance for the jury. Surely, it would not be legal or right to convict a man of passing a counterfeit bill, knowing it to be counterfeit, when he was so intoxicated as not to know a counterfeit bill from a genuine one, without proof to show that previous to his intoxication he knew it was counterfeit.

In this case, we think the court below erred in withdrawing the attention of the jury from the circumstance of intoxication in the manner the case shows.

The counsel for the prisoner substantially requested the court to charge the jury that they had a right to take the intoxication of the prisoner into consideration, with the other circumstances of the case, in determining the intent, and that if they found that there was no intention to commit the crime of murder, the jury should find a verdict of manslaughter.

The Court by refusing to so charge, and thereupon charging that intoxication was an aggravation of crime, that it

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“never excused crime unless it was of a degree to deprive the offender of his faculties;” not only erred in refusing to submit the circumstance of intoxication to the jury, for their consideration as to whether they should find the prisoner guilty of murder or manslaughter, but may have led the jury to suppose that his intoxication was absolutely to be weighed against him in settling their verdict as between murder and manslaughter. And, certainly, had the prisoner been on trial for manslaughter only, his intoxication would have tended to make out, and perhaps to aggravate the crime; because it would have tended to show, that the prisoner did the act in the heat of passion.

The error of the court below, does not consist in charging the law wrong as far as the court positively charged; but in giving to the jury good law, on a point where it was applicable, as a reason for refusing to charge other good law as requested, as to the point of intention where it was applicable.

It is true, and the law in England and in this country is, that if a man voluntarily makes himself drunk, it is no excuse for any crime he may commit while he is so. (1 *Hale*, 7; 4 *Bl. Com.*, 26; *People v. Pine*, 2 *Barb.*, 566.)

But it does not follow, because drunkenness is no excuse for crime, that it is not in some cases, where the question of guilt or innocence is one of intent, or where the degree of the crime on the same facts depends on the specific intent, a material circumstance in determining whether any crime had been committed, or the degree of the crime which had been committed.

We think that in this case, the right of the prisoner to have the circumstance of his intoxication fairly submitted to the jury on the question of intent, or whether he was guilty of manslaughter or murder, as clear and as well established by law, as the principle that voluntary drunkenness is no excuse for crime.

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The principles are consistent with each other. (*Am. Cr. L.*, §§ 41-44, and cases there cited.)

The prisoner stands confessedly guilty of a great crime, and one which from the bold, rowdy recklessness of human life which it and its attending circumstances displayed, calls for a firm condemnation of the law, according to the most stringent, but just rules of its interpretation and its principles, whatever weight his intoxication might have with a jury as to the degree of his crime.

The prisoner has his legal rights, and it is the duty of the court, uninfluenced by the repulsive features of his admitted crime, or the condemnatory comments of an excited public press, to see that those rights are protected, and that he is condemned according to the rules of law.

We think, for the reasons above stated, he may have been prejudiced by not having had the circumstance of his intoxication submitted to the jury with the other circumstances of the case, especially considering the positive charge of the court, and that he is therefore entitled to a new trial.

Judgment reversed and new trial ordered.

SUPREME COURT. Clinton General Term, May, 1858. *C. L. Allen, James, Rosekrans and Potter, Justices.*

THE PEOPLE *v.* JOEL W. HOLCOMB and others.

At common law, all warrants in criminal proceedings are required to be under the hand and seal of the magistrate who issued them. Certain statutory exceptions stated by ROSEKRANS, J.

A search warrant, not under seal, is void, and affords no protection to an officer attempting to execute it.

Nor can a search warrant be sustained as valid when directed to "any constable" of the county in which the search is directed to be made, the statute requiring all search warrants to be directed "to the sheriff of the county, or to any constable or marshal of the town or city" in which the stolen property is alleged to be secreted.

The place to be searched must be particularly designated in the search warrant. Where a part of the complaint was recited in the warrant, in which it was stated that the complainant suspected the stolen property was concealed in the stable of C. P., on the east side of the canal, in the village of Whitehall, in said county, known as the "red barn," and then the warrant gave direction to search the places where said property was suspected to be concealed, it was held insufficient, for the reason that though the place mentioned in the complaint was sufficiently designated, the direction given in the warrant was too general, and authorized the search of any suspected place, instead of confining the search to the place so suspected by the complainant.

Whether a search warrant can be executed, or afford protection to an officer, where it shows upon its face that the party who has the property alleged to be stolen is charged with the larceny of it, and no warrant for his arrest accompanies, or is incorporated in the search warrant, *quere?*

Form of an indictment for an assault and battery committed on an officer while engaged in the execution of his office, with a count for riotously and routously resisting the execution of process, and a count for resisting the execution of a search warrant under the *Act of 1845 (ch. 69, § 17.)*

CERTIORARI to the Court of Sessions of Washington county. The indictment contained four counts, and was as follows:

Washington County, ss:

The jurors of the people of the State of New-York, of the body of the county of Washington, to wit, Ebenezer

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McMurray, &c., good and lawful men of the body aforesaid, then and there sworn and charged to inquire for the people of the said body, upon their oath present: That Joel W. Holcomb, James Woodard, Henry Loomis and Charles Pardo, late of Whitehall, in said county of Washington, on the twenty-ninth day of May, in the year of our Lord one thousand eight hundred and fifty-five, at the said town of Whitehall and county of Washington, in and upon one Henry H. Knight, then being one of the constables of said county, in the peace of God and of the said people, then and there being, and in the due execution of his said office, then and there also being, did make an assault, and him, the said Henry H. Knight, then and there did beat, wound and ill treat, and the due execution of his said office, did then and there, with force and arms, resist, hinder and prevent, contrary to the statute in that case made and provided, and against the peace of the people of the State of New-York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That Florus D. Meacham, Esquire, was a justice of the peace, in and for the county of Washington, at the town of Whitehall, on the said twenty-ninth day of May, in the year of our Lord, one thousand eight hundred and fifty-five, that on the said twenty-ninth day of May, in the year of our Lord, one thousand eight hundred and fifty-five, at said town and county, the said Meacham, as a justice of the peace aforesaid, duly issued a certain process called a search warrant, subscribed with his name, directed to any constable of said county, and commanding them in the name of the people of the State of New-York, to search a certain barn in said town of Whitehall, which was in said warrant particularly described, in the day-time, for certain personal property, in said warrant particularly set forth and described, belonging to one Alwyn Martin and one Moses T. Clough, which property had been stolen and feloniously taken, and was then concealed in said barn, and said stolen property to

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bring before said justice of the peace, all of which will, by said warrant, more fully and at large appear, that one Henry H. Knight, then and there, was a constable in and for said county, at Whitehall in said county, that said process was duly delivered to him for execution at the time and place aforesaid, that said constable then and there proceeded to the due execution thereof, and was at and about the searching said barn, in the day-time, for said stolen property, to take the same before said justice, as by said warrant he was commanded; and that on the day and at the place last aforesaid, Joel W. Holcomb, James Woodard, Henry Loomis and Charles Pardo, in and upon the said Henry H. Knight, then and there being in the due execution of said process, did make an assault, and the execution of said process did then and there, with force and arms, maliciously and willfully resist, and him, the said Henry H. Knight, did then and there, from the execution of said process, hinder and prevent, and the said stolen property did then and there, with force and arms, violently and unlawfully, from the custody and possession of him, the said Henry H. Knight, receive and take away, contrary to the statute in that case made and provided, and against the peace of the people of the State of New-York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present: That Joel W. Holcomb, James Woodard, Henry Loomis and Charles Pardo, late of Whitehall in said county, on the twenty-ninth day of May, in the year of our Lord, one thousand eight hundred and fifty-five, at the said town of Whitehall and county of Washington, with force and arms, did unlawfully, riotously and routously assemble together to disturb the peace, and being so assembled together, in and upon one Henry H. Knight, then and there being one of the constables of the said county of Washington, in the due and lawful discharge of the duties of his office as constable of said county being, in the service of a lawful process, to any constable of said county directed, and

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by him then and there had and held for execution as such constable, commanding him to search certain premises in said town and county, for certain stolen property, and the same to bring before the magistrate issuing said process; which place and property was, in said process, particularly described and set forth, said process having been issued by one F. D. Meacham, a justice of the peace in and for said county, at said town of Whitehall, and having due authority and power to issue the same, did make an assault, and riotously and routously him, the said Henry H. Knight, did resist, hinder and obstruct in the discharge of the duties of his office of constable, and the execution of said process, and the place which by said process said Knight was commanded to search, did, with force and arms, unlawfully hinder and prevent from searching, and the said stolen property did prevent and hinder from being taken before the magistrate issuing said process, as by the command thereof said constable was directed.

And the jurors aforesaid, upon their oath aforesaid, do further present: That Joel W. Holcomb, James Woodard, Henry Loomis and Charles Pardo, late of Whitehall, in said county of Washington, on the twenty-ninth day of May, in the year of our Lord, one thousand eight hundred and fifty-five, with force and arms, at said town of Whitehall and county of Washington, the execution of a certain process called a search warrant, in due form of law issued by an officer having full authority and jurisdiction to issue the same and then and there had and held, by one Henry H. Knight, then and there being a constable in and for said county, for execution, did resist, and the execution thereof did then and there prevent, hinder and obstruct, contrary to the statute in that case made and provided, and against the peace of the people of the State of New-York, and their dignity.

JOSEPH POTTER,
District Attorney.

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The defendants pleaded "not guilty;" and the issue came on to be tried in the Court of Sessions of Washington county, in February, 1856, before the county judge and the justices of the Sessions, with a jury; and the people, to maintain the issue on the part of the prosecution, gave in evidence a certain paper or instrument, purporting to be a warrant, and signed by one F. D. Meacham, a justice of the peace, which instrument is in the words and figures following:

Washington County, ss:

To any constable of said county, greeting:

Whereas, Alwyn Martin has made complaint on oath before me, F. D. Meacham, one of the justices of the peace of the said county, that, on the twenty-seventh day of May, one thousand eight hundred and fifty-five, certain personal property of the said Alwyn Martin and Moses T. Clough, to wit, one chestnut colored stallion horse, of the value of two thousand dollars or upwards, was stolen and feloniously taken from the possession of the said Martin and Clough, in the town of Whitehall, in the said county; and that he suspects that Henry Loomis did steal and take the same, as aforesaid, and that the said property is now concealed in the stable of Charles Pardo, on the east side of the canal, in the village of Whitehall, in said county, known as the Red Grocery Barn:

Therefore, the people of the State of New-York command you to search the place where the said property is suspected to be concealed, in the day-time, and that you bring the same before me.

Witness my hand, this twenty-ninth day of May, one thousand eight hundred and fifty-five.

F. D. MEACHAM,

Justice of the Peace.

The defendants objected to the same being given in evidence, because it was directed to any constable of the county

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of Washington, and not to the sheriff of the said county, nor to any constable or marshal of the town of Whitehall, where the process was issued, and the supposed stolen property was concealed, as required by the statute; and because it commanded the officer to search the place where the said property is suspected to be concealed, and did not require him to search in any particular place, but, on the contrary, was a general warrant, authorizing a search in any place where it might be suspected the property might be; and because the warrant on its face was unauthorized and void. All of which objections were overruled by the court, and the warrant admitted in evidence, and the defendants excepted to each and every of the decisions of the court, overruling each and every of said objections.

Evidence was then given of an attempt by Henry H. Knight, a constable, to execute the warrant, and of forcible resistance by the defendants. The court charged that the warrant was valid; to which the defendants excepted; and the jury found the defendants guilty.

A bill of exceptions having been made and proceedings stayed, a *certiorari* was issued and return made.

Clough & Sheldon, for the defendants.

I. The warrant was void: first, it was directed to "any constable of said county." There is no such officer; and the statute is plain that it must be directed to the sheriff of the county, or to the constable of the town, or marshal of the city, &c. (2 R. S., 746, § 26; *id.*, 831, § 30, 3d ed.; *Russell v. Hubbard*, 6 Barb., 654, and cases there cited.) Second. The warrant did not particularly describe the place to be searched. This is required by the bill of rights, by the constitution, and by the statute. (1 R. S., 93, § 11; *id.*, 94, § 11, 3d ed.; *Const. U. S.*, 4th amend.; 2 R. S., 746, § 26; *id.*, 831, § 30, 3d ed.) By no grammatical construction can the barn be deemed the place where "the property

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is suspected to be concealed." The suspicion applies to Loomis. It is, in fact, a command to search any place where any one suspects the property may be concealed, a general warrant, commanding the officer to search any place, and therefore void.

II. The process being invalid, the defendants were justified in resisting this outrage upon the person and property of Holcomb. This protection extends to third persons. (1 *Chit. Cr. L.*, 60, 61; 1 *Russ. on Cr.*, 618.)

A. L. McDougall (District Attorney), for the people.

I. The first objection is trivial. The direction is a compliance with the statute. It is to be directed to the sheriff or to any constable, &c. (2 *R. S.*, 929, 4th ed.) The latter was the direction in this case. The object of the direction is to inform the person to be arrested who or what class of officers are authorized to arrest him. That object is satisfied by this direction. (1 *Chit. Cr. L.*, 38; *Mag. Cr. L.*, 458, 459.)

II. The second objection is not less frivolous. 1. The statute requires the place properly to be designated in the warrant. In this case, both were particularly described. The magistrate in the first place described where the property is suspected to be concealed. It then commands the officer to search the place where said property is suspected of being concealed, &c. It is the same as if he had said search "said place," which is the form laid down in *Magistrate's Criminal Law* (p. 565). The one expression is as certain as the other. There is no room to doubt the place to be searched. 2. The language of the warrant is a precise transcript of the statute in this respect. (2 *R. S.*, 929, 4th ed.) That was the most certain language the revisors could employ. 3. The warrant is a substantial compliance with the statute, and is not therefore void, and will therefore protect the officer, especially against contemners of the law,

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its process and officers. (*Rosc. Cr. Ev.*, 620 ; 1 *Hale*, 457, 459, 460 ; 1 *East*, 310.)

By the Court, ROSEKRANS, J.—The defendants were indicted for resisting a constable in executing a search warrant, issued by a justice of the peace, in these words :

[The search warrant was here set forth in the same words as in the statement of this case.]

The acts of the defendants, which were proved, were sufficient to convict them of the offence if the warrant was a legal justification of the constable in making the search, and taking the property. Upon the trial the defendants insisted that the warrant was void : First. Because it was directed “to any constable of the county of Washington,” instead of the “sheriff of the county, or a constable of the town of Whitehall ;” Second. Because it commanded the officer to search the place where the property was suspected to be concealed, without describing the place ; and, Third. That the warrant was unauthorized. These objections were overruled, and the defendants excepted. The court charged the jury that the warrant was valid, and the defendants excepted to this part of the charge.

The warrant, although it recites a complaint on oath, that a larceny had been committed and that the complainant suspected that Henry Loomis had stolen the property and had secreted it in the stable of Charles Pardo at Whitehall, does not direct the arrest of Loomis but only that the officer should search for the stolen property and bring it before the justice. Had it directed the arrest of the person charged with the offence, it might have been directed to the sheriff of the county or any constable of any town in the county and need not have been under seal. (2 *R. S.*, 890, § 3, 4th ed.) But search warrants are by statute required to be directed “to the sheriff of the county or to any constable or marshal of the town or city” (2 *R. S.*, 929, § 33), and by the common law, warrants, in criminal proceedings, are

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required to be under the hand and seal of the magistrate who issues them. (4 *Bl. Com.*, 291; 2 *Hawk.*, 85, 136; 4 *Burns' Justice*, 393, 394.) In *Beckman v. Traver* (20 *Wend.*, 68) the court say that the word "warrant" implies that the process is under the hand and seal of the magistrate, and that it would not be a warrant in the sense of the law unless it was sealed. The same doctrine is held in North Carolina, (*Welch v. Scott*, 5 *Ire.*, 72; *State v. Woolsey*, 11 *ib.*, 242), in Maine, (*State v. Drake*, 36 *Maine*, [1 *Heath*] 366; *State v. Coyle*, 33 *Maine*, [3 *Red.*] 427; *State v. McNally*, 34 *id.*, 210). The search warrant in *Bell v. Clapp* (10 *J. R.*, 263) was under the hand and seal of the justice. Our statutes have dispensed with seals to process in various cases. Warrants issued by justices of the peace in civil cases "may be under or without seal." (2 *R. S.*, 453, § 153.) Warrants issued for the arrest and examination of offenders may be with or without seal. (2 *R. S.*, 890, § 3.) Also warrants under the statute entitled "Of proceedings to prevent the commission of crimes." (2 *R. S.*, 888, § 3.) Warrants issued upon judgments of Courts of Special Sessions may be only "under the hands of the magistrates who held the court." (2 *R. S.*, 901, § 36.) Also warrants issued by trustees of school districts annexed to tax or rate bills may be under the hands of the trustees, and it is expressly provided that they need not affix their seals. (1 *R. S.*, 902, § 144.) But the statutes directing the issuing of a warrant against the putative father of a bastard child (2 *R. S.*, 57, § 6) and the statute entitled "Of betting and gaming" (1 *R. S.*, 75, § 24) and the statute authorizing the issuing of search warrants for stolen property (2 *R. S.*, 929, § 32), merely direct or authorise the issuing of warrants, without specifying whether they shall be with or without seal. As the common law required a warrant to be under seal, and the legislature in reference to warrants authorized to be issued in various cases, both civil and criminal, have expressly provided that they may be issued without the seal of the magistrate or offi-

oer, the rule of *expressio unius est exclusio alterius* requires that, in those cases in which warrants are not expressly authorized to be issued without seal, they should be issued under seal. (*Bouv. L. Dic.*, title "*Search Warrant.*") If this position is correct, the warrant under which the officer was acting when he was assaulted and resisted by the defendants was void upon its face and afforded him no protection; the resistance of the defendants was lawful and the ruling of the Court of Sessions that the warrant was valid and that such resistance was unlawful, was erroneous. (*Sanford v. Nichols*, 13 *Mass.*, 288.

We think, too, that the objection that the warrant did not conform to the statute in its direction was well taken, and that it was for that reason void upon its face. The statute declares that "such warrant shall be directed to the sheriff of the county, or any constable or marshal of the town or city." The warrant issued to the constable who was resisted was directed "to any constable of said county" (Washington). It is clear that a warrant can only be executed by the officer to whom it is directed; and in the hands of any other person or officer than one of those to whom its execution is by law intrusted it is of no validity. There is no such officer as a "constable of the county." Constables are town officers. But perhaps the reasonable construction of the direction of the warrant is, "to any constable of any town in the county of Washington." If so, it is unauthorized. The statute contemplates that a search warrant should only be executed by the sheriff of the county, or a constable or marshal of the town or city in which the stolen property is alleged to be secreted. To direct it to any other officer is a violation of the statute. The direction of a warrant is a material part of it. (*Russel v. Hubbard*, 6 *Barb.*, 656, and authorities there cited; 1 *Chit. Cr. L.*, 48.) In *King v. Weir* (1 *Barn. & Cress.*, 288), Barley, J., says: "It is of great consequence that magistrates should be careful to direct their warrants in such manner that the parties to be

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affected by them may know that the persons bearing them are authorized to execute them;" and Allen, J., says, in *Russell v. Hubbard* (*supra*), "a delivery to a proper officer is not the direction required by law." Hawkins says: "If a warrant is generally directed to all constables, no one can execute it out of his own precinct." Courts should construe statutes in relation to search warrants strictly, and see that the specific directions of those statutes are rigidly followed. A search for and seizure of property, not made in the cases and according to the exact mode prescribed by statute, is an unreasonable search and seizure, the right to be secure against which should not be violated. (*Bill of Rights*, 2 R. S., 302, § 11; *Const. U. S., amend. art 4.*)

We think, too, that the warrant is void upon its face, in not designating particularly the place to be searched. It stated, in the part reciting the complaint, that the complainant "suspects that the stolen property is concealed in the stable of Charles Pardo, on the east side of the canal, in the village of Whitehall in said county, known as the red barn." This designation of the place would be sufficiently specific if the direction to search was confined to that place, either expressly, by repeating it, as was done in the warrant in *Bell v. Clapp* (10 *John.*, 263), or by reference, as in the case of *Commonwealth v. Dana* (2 *Metc.*, 831, *note*) and in *Sanford v. Nichols* (13 *Mass.*, 386). But the direction is not to search the said place, which would limit the search to Pardo's barn before described. The constable is directed "to search the place where the said property is suspected to be concealed." This direction, if constitutional and legal, would authorize search in any other place where the officer or any other person might suspect the property to be concealed. It is a general warrant for a search of suspected places. The words, "the said property," are a sufficient designation, by reference, of the property to be searched for, but the place where the search is directed to be made is not designated with sufficient particularity to comply with the

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requirements of the constitution and statute, It is no answer to this objection that the officer may have construed the warrant as only authorizing a search at Pardo's barn, nor that the search which he made and which the defendants resisted was made at that place. The question is not, what construction did or might the officer put upon the warrant, nor whether his acts were such as would have been legal and justifiable under a warrant which would have been authorized by the complaint, but it is simply whether the warrant, according to the legal construction of its language, confines the search to the particular place designated in its reciting part as the place of suspected concealment of the property. We think it does not, and that nothing should be left to inference or intendment in that particular. The place of search mentioned in the reciting of the warrant should either have been repeated in its mandatory part or have been designated by reference to it, as "the said place where the said property is, as before mentioned, suspected to be concealed."

It is also questionable whether a search warrant can be executed, or afford protection to an officer, where it shows upon its face that the party who has the property alleged to be stolen is charged with the larceny of it, and no warrant for his arrest accompanies or is incorporated in the search warrant. The complaint recited in the warrant disclosed that a criminal offence had been committed by Loomis as clearly as it did the place of concealment of the stolen property. Both were founded merely upon suspicion, and without a disclosure of the facts upon which the suspicion was based, the justice should not have been satisfied of the existence of either. The reasonable grounds of suspicion should have been set forth. This, however, did not affect the officer's right to execute the process. But if the larceny was satisfactorily made out, it was the duty of the justice to issue a warrant for the arrest of Loomis. (2 R. S., 890 § 3), and when the property alleged to be stolen was taken

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by the constable, he was required to keep it subject to the order of the magistrate who issued the warrant, and who should take the examination of the defendants, and such magistrate, upon satisfactory proof of the title of the owner, is authorized to order the property delivered up to such owner (2 R. S., 930, §§ 37, 38); and if stolen property shall come into the hands of a justice of the peace, upon like proof he may order it delivered to the owner (*id.*, § 39); but it was never contemplated that a search warrant should be issued to obtain possession of property alleged to have been stolen, and when brought to the justice that he should order it to be delivered over to the person claiming to be the owner, upon *ex parte* proof of his title. No freeman can be thus dispossessed of property. He is entitled to a day in court, and a hearing in some tribunal, civil or criminal, before his possession is disturbed. An ample civil remedy is provided for the delivery of property held under circumstances such as were disclosed by the complaint in the case. His proceedings under his complaint and warrant were anomalous and unprecedented. They seem to have been designed by him to perform the office of the old writ of replevin, or the proceedings under the Code of Procedure for the claim and delivery of personal property, without subjecting him to the inconvenience of giving security for the return of the property, if return thereof should be adjudged, and without giving the defendant Loomis, who was charged with the larceny, an opportunity to establish his title or right to the possession of the property, or to defend his reputation against the serious charge preferred against him. No warrant was issued for his arrest, nor was he arrested for the alleged larceny, although he was present at Pardo's stable and resisted the officer in his attempts to take the property. No notice was given him, or could be legally given him, under the process, of the time when or the place where the proof of the complainant's title to the property was to be furnished to the magistrate. It was probably not intended

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that he should have had such notice. This *novel disseizin* might not have worked as it was designed had the notice been given. At common law it was necessary that a search warrant should command that the goods found, together with the party in whose custody they should be taken, should be brought before the magistrate, to the end that upon examination of the facts, the goods and the prisoner might be disposed of according to law. (2 *Hale*, 150; 15 *Petersd. Abr.*, 361, *margin and note.*) The revisors make this citation from *Hale* in their notes to the section of the statute authorizing a search warrant; and also 3 *Dickinson's Justice*, 505 (3 *R. S.*, 838, 2d ed.); also, to the same effect, *Bouvier's Law Dictionary*, title "search warrant," and authorities cited. (1 *Chit. Cr. L.*, 64.)

For these reasons the judgment of the Sessions should be reversed and the defendants discharged.

MONROE OYER AND TERMINER. April, 1858. Before *Welles*, justice of the Supreme Court, *George G. Munger*, county judge, and *Ephraim Goss* and *James Swayne*, justices of the Sessions.

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At common law, the information obtained by physicians in their professional intercourse with patients was not privileged from disclosure.

The provisions of the Revised Statutes on that subject (2 R. S., 406, § 73), are intended to establish, between physician and patient, the same rule as that existing between attorney and client.

The "information," of which the statute forbids the disclosure, is not confined to communications made by the patient, but extends to all facts which necessarily come to the knowledge of the physician in a professional case.

The statute is for the protection of the patient and not the physician, and being of a remedial nature, it should be construed liberally and with reference to the evil it was designed to remedy.

To bring a case within the protection of the statute it is not necessary that the technical relation of physician and patient should exist; but the statute is applicable where a physician has attended upon a person under circumstances calculated to induce the opinion that his visit was of a professional nature, and the visit was so regarded and acted upon by the person so attended.

Where a person had been arrested and confined in jail, on a charge of murder, and was in a disabled and shattered bodily condition, and two physicians were sent by the coroner to the jail to examine the injuries of such prisoner, who informed him of the object of their visit, and whom he knew to be physicians, and the prisoner consented and submitted to such examination, and answered all the questions asked him, and requested one of the physicians, as he was leaving, to call again the next day, it was held, on the trial of the prisoner for the murder charged, that the case was within the statute, and that such physicians, who were called as witnesses, could not be permitted to disclose any information they acquired on such visit to the prisoner.

THE prisoner had been indicted for the murder of Charles W. Littles. At the trial, a question of evidence arose which was considered and decided in the following opinion. The circumstances under which the question arose are fully stated in the opinion of the majority of the court.

C. Huson, Jr. (District Attorney), for the people.

J. N. Pomeroy, for the prisoner.

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By the Court.—In order to arrive at a correct determination of the question before the court, a brief review of the facts upon which it arises will be necessary.

Early on the morning of the twentieth of December last, the body of Charles W. Littles was found in the Genesee river, just below the high falls. The examination of the spot, which was soon thereafter made, induced the opinion that Mr. Littles had been killed during the preceding night, on the summit of the high bank above, and that his body had been thrown over the precipice and dragged to the river. There were some circumstances also indicating that the perpetrators of the crime had themselves been precipitated over the bank, either in the struggle or in their efforts to remove the dead body.

The prisoner was arrested during the forenoon of the same day, and taken to the police office, on suspicion of being one of the persons connected with the homicide. His arm was in a sling, and scratches and contusions were discernible on his face. He was committed to the county jail. The following morning his condition was such as to require medical aid, and accordingly Dr. Langworthy, the physician to the jail, was called in. The doctor visited him between ten and eleven o'clock. It does not appear that the prisoner knew Dr. Langworthy or his official character. The doctor thinks that he understood, however, that he was a physician. There was no prescription made at the time, but the doctor says he told him what he was going to prescribe, and thinks there was something said about his being his physician in future.

Shortly after this visit, and before noon, two gentlemen, whom the prisoner had seen the day before at the police office engaged in the post mortem examination of Littles' body, viz., Drs. Montgomery and Avery, appeared at the prisoner's cell and stated that they had been requested by the coroner to examine him and see what injuries there were about his person. Dr. Avery says he presumes they informed him that they were

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physicians. The prisoner was at the time lying on a cot in his cell, and either suffering considerable pain or much depressed. They felt of his pulse, counted its pulsations by the watch, looked at his tongue, asked him questions, pressed on his chest and shoulder, and, in short, as they say, conducted themselves, as to their manner, precisely as if they had been examining one of their own patients with a view of ascertaining his injuries and making the necessary prescription or surgical operations. The prisoner consented to the examination, granted every request, and answered all questions. As the physicians were leaving, and before Dr. Montgomery was out of the cell, the prisoner asked him if he would call again, or to-morrow, or something to that effect. There was no prescription made, and no conversation about any being made. Dr. Montgomery, in response to a question, "whether, from their manner, the prisoner had reason to think they were physicians, and were examining him with a view to treatment, and whether, in his opinion, he did so regard them?" answers affirmatively, and gives as his reason the particulars of their manner, as above stated, and the "entire submission, and willingness, and readiness of the prisoner to do what was asked of him," together with the prisoner's closing inquiry, above given.

Upon this state of facts, Dr. Avery, the witness on the stand, is asked to describe the condition of the prisoner, as ascertained at that interview.

The counsel for the prisoner objects to the reception of any testimony under this question, on two grounds:

First. That this examination was involuntary and compulsory on the part of the prisoner; and,

Second. That the admission of the evidence would be a violation of the statutory prohibition against a disclosure by physicians of information derived in the course of professional treatment of patients.

It cannot be necessary to discuss the question suggested by the counsel for the prisoner under the first branch of the

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objection, viz., that facts obtained compulsorily from a party charged with crime, cannot, any more than confessions thus obtained, be given in evidence, for we are of opinion that the mental state of the prisoner was one of assent to the examination. The very foundation of the counsel's argument therefore fails. The mere fact of being in custody cannot be urged against satisfactory evidence of positive assent.

The other branch of the objection deserves more consideration.

At common law the information derived by physicians in their professional relations with patients was not privileged from disclosure. The only privileged communications in this respect were those between attorney and client, and the general rule was adopted, that those communications passing between them during the professional relation were protected from disclosure. The reason of this doctrine of the courts was the necessity on the part of the public of intrusting business to the legal profession, and the insecurity of so doing if the information thereby imparted were liable to divulgement.

The restriction of this doctrine to the legal profession was, at an early day, regretted. In *Wilson v. Rustall* (4 Term R., 756), Mr. Justice Buller said "there were cases in which it was much to be lamented that the law of privilege was not extended to those in which medical persons were obliged to disclose the information which they acquired by attending in their professional character."

Upon the revision of the Statutes of this state in 1828, the revisors noticed this omission in the common law, and introduced a section amendatory of the defect, which is as follows:

"No person duly authorized to practice physic and surgery shall be allowed to disclose any information which he may have acquired in attending any patient in a professional

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character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." (2 *R. S.*, 327, § 93, 2d ed.)

The revisors' note to this section indicates clearly, in accordance with the manifest meaning of the provision, that the design was to create a privilege in the case of the medical profession analogous and commensurate with that which had always existed in the case of the legal profession. The note is as follows: "The ground on which communications to counsel are privileged is, the supposed necessity of a full knowledge of the facts to advise correctly, and to prepare for the proper defence or prosecution of a suit; but surely the necessity of consulting a medical adviser, when life itself may be in jeopardy, is still stronger, and unless such consultations are privileged, men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art, and without conviction of any offence. Besides, in such cases, during the struggle between legal duty on the one hand and professional honor on the other, the latter, aided by a strong sense of the injustice and inhumanity of the rule, will in most cases furnish a temptation to the perversion or concealment of truth too strong for human resistance. In every view that can be taken of the policy, justice or humanity of the rule as it exists, its relaxation seems highly expedient. It is believed that the proposition in the section is so guarded that it cannot be abused by applying it to cases not intended to be privileged." (3 *R. S.*, 737, 2d ed.)

We are called upon for the first time, so far as we are aware, to give a construction to this statute upon the point involved in this case. In the absence of authority, which we exceedingly regret, we must be guided by the obvious spirit of the statute, and by a reference to the analogous privilege as to counsel, of which privilege this statute, as it is apprehended it will be readily conceded, is merely declaratory as applied to physicians.

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In the first place, it is plain to us that the "information" mentioned in the statute is not confined to communications made by the patient: it extends to all facts which necessarily come to the knowledge of the physician in a given professional case. Such a range must manifestly be given in the use of the term in order to effectuate the design of the statute, and is in accordance with the well settled rule in the case of an attorney. (11 *Paige*, 377.)

The next question is as to the persons between whom the relation must exist, It would seem to be absolutely necessary that the party on one side should be a duly qualified physician. That, under the statute, is in the nature of a condition precedent, so to speak. This qualification, also, has always been annexed to the privilege in the case of attorneys.

The remaining question, so far as this case is concerned, is, what must be the nature of the relation between the parties.

A literal construction of the statute would require the technical relation of physician and patient to exist. But is that indispensable? In the case of a visit from a physician, may there not be a state of circumstances which falls short of constituting this technical relation, but which presents a very proper case for the application of the statute?

This is, in our judgment, the real question before us, and it consequently deserves full consideration.

The thought naturally first suggested is, that the statute is for the protection of the patient and not for that of the physician. This very point has been ruled under the statute (14 *Wend.*, 637; *Johnson v. Johnson*, 2 *Cow. & Hill's Notes*, 1574), and it is in consonance with the well settled doctrine in the analogous case of attorney and client.

The statute is, moreover, of a remedial nature, and must be construed liberally. In the case of such a statute, it is peculiarly the duty of the court to look for its spirit, and be guided thereby in its application.

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The spirit of this statute we apprehend to be that, whenever the confidential relation of physician and patient has once existed, and the patient has, in consequence thereof, yielded to examinations and made communications which he would not otherwise have made, the seal of secrecy shall be set on the transaction. It follows that it is the duty of the court to give full effect to this wise and humane provision. Such effect cannot, however, be given unless the party be protected in all cases of confidential disclosures whenever the patient had reason to suppose that the relation existed, and did, in fact and truth, so suppose. The injury to him is as great, in the case of divulgement of information thus obtained, as it would be if the relation had technically existed; for it is plain that the opportunities for gaining the information would not have been voluntarily afforded had it not been for an entire confidence in the fact of such relation existing. We are of opinion, therefore, that in a case in which a physician has attended upon a person, under circumstances calculated to induce the opinion that his visit was of a professional nature, and the visit has been so regarded and acted upon by the person, that the relation of physician and patient contemplated by the statute may fairly be said to exist. The spirit of the statute is thereby respected, and no great violence done to its literal terms.

A reference to the corresponding privilege in the case of attorney and client, will, it is apprehended, confirm this view.

The rule in general statement is laid down quite as strictly as in the statute before us, that the professional relation must exist; yet it is well settled that no regular retainer as counsel is necessary, nor any particular form of application or engagement, nor the payment of fees, or the expectation of payment, or receipt of fees. (12 *Pick.*, 89; 3 *Sandf. Ch. R.*, 35.)

Again, the doctrine is laid down in general terms equally strictly, that the information, in order to be protected, must

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have been necessarily obtained in the course of the professional relation, and that no collateral matters will be privileged. But it has been held that the privilege extended to any communication made by a client under a mistaken belief of its being necessary to his case. (8 *Eng. L. and Eq. R.*, 554.)

And lastly, it has been held that the general rule that the professional relation must exist is not inflexible, and that there may be cases in which the communications will be privileged, although the relation did not, in point of fact, exist at all. (*Smith v. Fell*, 2 *Curt.*, 667 ; 1 *Greenl. on Ev.*, 307, note 2 ; *Sargent v. Hampden*, 38 *Maine*, 58.) In the former of these cases a professional person had been requested to act as solicitor, and the communication was made under the supposition that he had accepted. A brief extract from the opinion of Howard, J., in the latter case, will not be without value. After stating the common law rule and the *rationale* of it, he proceeded :

“The reasons upon which this time honored rule of law is founded may apply with equal force where one makes application to counsel for professional services, although the relation of client and attorney do not, in fact, subsist, as where the latter may not conclude whether to withhold or render his professional aid until the applicant has disclosed the merits of his case. Then if he should decline to act professionally in the matter, on account of prior engagements and prior obligations to others, or from necessity or choice, the disclosures and communications then made should be privileged. As they were committed to him in his professional character, the spirit of the rule would require that they should not be divulged without the assent of the party by whom they were made.”

Support may also be derived from analogous cases. One only will be suggested :

The Revised Statutes justify a homicide if committed by a person in self-defence, when there shall be a reasonable

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ground to apprehend a design to commit some great bodily injury on him, and there shall be imminent danger of such design being accomplished. Under a literal construction of this statute the imminent danger must be one of reality and fact, but a just regard for the spirit of the statute requires the extension of its provisions to other cases, and such liberality of construction has been shown by our courts. In *Shorter v. The People* (2 Comst., 193), the Court of Appeals held that a case in which a person was attacked under such circumstances as to furnish reasonable ground for apprehending a design to take away his life, or to do him some great bodily injury, and there was reasonable ground for believing the danger imminent that such design would be accomplished, was a proper case for the application of the statute, although there was, in fact, neither design to do serious injury, nor danger that it would be done.

It remains to make an application of the fact before us to the proposed construction of the statute. The only point requiring consideration is whether the prisoner had reasonable grounds for the supposition that Drs. Montgomery and Avery came to him for the purpose of examination and treatment, and did so suppose.

In the first place, it is clear that he had reason to expect medical aid from the public authorities. He was in a disabled and shattered condition, evidently having either been engaged in a terrible struggle, or having fallen over the river bank, or both. He was a captive in the hands of the public authorities. It was their duty, under such circumstances, to furnish him all reasonable medical aid and attendance. This he had a right to expect, and probably did expect.

We are also of opinion that the prisoner had reasonable ground of apprehension that Drs. Avery and Montgomery called to render him aid. Their language to him which introduced this interview, though to our minds and at this distance from the occasion conveying a different meaning from that in which the prisoner manifestly received it, did

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not necessarily exclude the idea of their visit being one of a professional nature. By a person reduced by pain and very much in need of treatment the language would not be closely scanned, and it might well be understood by him as a message from the coroner to examine into his injuries. Their manner to him was, moreover, purely professional, and as we now look at the description of it, aside from the other matters, we naturally adopt the conclusion that it was by professional men for professional purposes, rather than by government witnesses to obtain testimony for the prosecution. It may be said that Dr. Langworthy had been to the prisoner previous to this, and that, therefore, he could not have regarded the gentlemen in question as coming in a professional capacity. We think, however, that this circumstance rather adds strength to our view, than otherwise. The prisoner might well conclude from Dr. Langworthy's visit that the public authorities were moving in his behalf. Upon others calling, it would have been far from illogical for him to infer that Dr. Langworthy had reported him to be in a serious condition, and that therefore others had been called in to advise in connection with Dr. Langworthy.

And, lastly, we are of opinion that the prisoner regarded the visit in that light. His manner throughout, and particularly his closing question or remark about their calling again the next day, are, to our minds, almost conclusive evidence on this point.

It is no valid objection to an application of this statute, that the prisoner did not probably know of its existence, and had no opinion whether or not the particulars of that interview would be privileged from disclosure. It is a sufficient answer that the salutary rule of law stands upon the statute book, and is to be dispensed alike to those familiar with or ignorant of its existence and applicability.

If the prisoner's mind had been carefully disabused at the outset of any notion of the examination being solely for his benefit, and he had been carefully advised that its sole object

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was to procure evidences of his guilt of the terrible crime of which he was suspected, there would be no ground or pretence for the position of his counsel. But so many things combining to satisfy us that he regarded the visit very differently, and had occasion for so doing, we feel bound, in a case like this, involving so deeply the dearest earthly rights of a man, to show all reasonable indulgence, both as to the law and fact.

We are of opinion that the objection to the testimony offered by the people should be sustained.

Goss, J. (Dissenting.)—The object of the statute was to make communications, made by a patient to his physician, confidential and privileged, and also to prohibit such physician from disclosing any fact or thing which he might learn in the treatment of the case. This was a wise and salutary provision, intended to protect the rights and feelings of patients, but, in order to be thus privileged, there must exist between the parties the relation of physician and patient. The patient must engage or employ his physician, and be liable (by an express or implied understanding) for the payment of his services. In this case, the physician called upon the prisoner, not as a physician at his request, but as the agent of public authorities of the county, to perform an official and not a professional duty, the same as a sheriff, constable or any other public officer might have been directed to perform. The prisoner was expressly informed by the physician that he called upon him by the order and under the direction of the coroner; he was not therefore misled as to the nature and character of the doctor's visit, and made no objection to such examination. Had the prisoner objected it could not have been properly made. As there was no deception, and the information as it appears fairly obtained, it can be regarded in the nature of a voluntary admission, and as such may be received in evidence. It seems clear to me that this case does not come within the prohibition of

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the statute cited by the prisoner's counsel, and with all due respect to the opinion of the majority of the court, I dissent therefrom, and think that the objection to this evidence should be overruled.

In accordance with the opinion of the majority, the evidence offered was excluded.

SUPREME COURT. At Chambers, Auburn, June 8, 1858. Before
Johnson, J.

THE PEOPLE v. ISAAC L. WOOD.

It is the duty of the officer to whom an application is made for an allowance of a writ of error and a stay of execution in a capital case, to deny the same if he is satisfied of the legality of the conviction.

On a trial for felony, separate and distinct felonies cannot be proved for the purpose of establishing the fact directly, that the prisoner committed the offence for which he is on trial, or for the purpose of raising any direct inference in the affirmative as to the principal issue; but such evidence is competent for the purpose of proving the existence of a motive to commit the crime in question, in cases where there is some apparent connection or relation between the imputed motive and the felonies proposed to be proved. ✓

Motive is a minor or auxiliary fact, from which, when established in connection with other necessary facts, the main or primary fact of guilt may be inferred, and it may be established by circumstantial evidence, the same as any other fact.

It does not lie with the prisoner to object that the fact proposed as a circumstance is so heinous in its nature, and so prejudicial to his character, that it shall not be used as evidence against him, if it bears upon the fact in issue.

The proper inquiry when the circumstance is offered is, does it fairly tend to raise an inference in favor of the existence of the fact proposed to be established? If it does it is admissible, whether such circumstance be innocent or criminal in its character.

THE prisoner had been convicted of murder at the Livingston Oyer and Terminer, and sentenced to be executed, and an application was made in his behalf for the

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allowance of a writ of error, and a stay of the execution of the judgment.

James Wood, for the prisoner.

A. A. Hendee (District Attorney), for the people.

JOHNSON, J.—The principal ground on which the application for the writ of error in this case rests is, that upon the trial evidence was allowed against the prisoner, tending to prove that both previous and subsequent to the time of the alleged murder, for which he was then on trial, he had been guilty of other and separate acts of a felonious character, for which indictments were then pending against him. Such evidence was allowed on the trial of the indictment upon which the prisoner was convicted, but it was not offered or allowed upon the principal issue, nor for the purpose of raising any direct inference in regard to the existence of the main fact in controversy. It was offered and allowed distinctly and solely for the purpose of establishing the *quo animo*, the motive existing in the mind of the prisoner, which the prosecution assumed incited and moved him to commit the offence charged against him, and for no other purpose.

The indictment was for the murder of Mrs. Rhoda Wood, the wife or widow of David J. Wood, in whose family the prisoner resided. The theory of the prosecution was, that the prisoner's motive in committing the alleged murder was to obtain the property and estate of D. J. Wood, or some considerable portion of it. The prisoner was the brother of D. J. Wood, and, as the prosecution assumed, he supposed and believed that D. J. Wood was possessed of a large estate, which he coveted; and that a portion of this estate would come to him as one of the heirs, if D. J. Wood and his wife and children could be put out of the way; that to accomplish this object, and to enable himself to appropriate

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a still larger share of the estate, by meditated forgeries and false claims against his brother, he commenced by murdering D. J. Wood, by administering to him arsenical poison, and shortly after, as the next step, he administered at the same time, the same poison, with the like intent, and for the same object, to Mrs. Wood and the two children, upon whom the law, at the death of D. J. Wood, had cast the whole estate, that having succeeded in destroying the life of Mrs. Wood, but failed in the attempt upon the lives of the two children, he immediately procured himself to be appointed guardian of the persons and estate of the children, and then commenced creating and uttering various false and forged claims against the estate, one of which was a note for \$2650, purporting to have been given by D. J. Wood to the prisoner over a year before the death of the former, which the prisoner turned out to his creditors in the city of New-York, soon after the death of Mrs. Wood and his assumption of the guardianship of the children. → 64

It was assumed and claimed by the prosecution, that these several felonious acts were but parts of a single transaction, influenced by a single motive, and designed to accomplish a single object. That they were all connected by unity of plot and design, and, if proved, would tend to show the motive which actuated the prisoner in taking the life of Mrs. Wood. Accordingly, evidence was allowed tending to show the commission of all these alleged felonious acts by the prisoner, for the purpose of establishing the assumed motive. The case being one of circumstantial evidence, wholly, proof of the existence of a criminal motive in the mind of the prisoner to commit the act was essential to making out a case against him which would justify a verdict of guilty. That the evidence tended directly to uphold the theory, and to establish the imputed motive, cannot, I think, be denied or doubted, and the only question is, whether evidence of that character is admissible for the purpose for which it was allowed to be given in this case. There can

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be no question that the acts, the declarations, and the conduct generally, of a party charged with the commission of an offence, both before and after its alleged commission, are competent to be proved upon the trial, to establish any fact essential to be proved, if they tend legitimately to establish such fact, and they are as competent to establish the existence of motive as any other fact. Motive is a minor or auxiliary fact, from which, when established in connection with other necessary facts, the main or primary fact of guilt may be inferred, and it may be established by circumstantial evidence the same as any other fact. The proper inquiry, when the circumstance is offered, is, does it fairly tend to raise an inference in favor of the existence of the fact proposed to be proved. If it does, it is admissible, whether such fact or circumstance be innocent or criminal in its character. It does not lie with the prisoner to object that the fact proposed as a circumstance is so heinous in its nature, and so prejudicial to his character, that it shall not be used as evidence against him if it bears upon the fact in issue.

The atrocity of the act cannot be used as a shield under such circumstances, or as a bar to its legitimate use by the prosecution. If it could, many criminals might escape just and merited punishment solely by means of their hardened and depraved natures. The rule appears to me to be well settled, both by elementary writers and by adjudged cases, that separate and distinct felonies may be proved upon a trial for the purpose of establishing the existence of a motive to commit the crime in question, even though an indictment is then pending against the prisoner for such other felonies. I might cite many elementary books and numerous cases where the rule is thus laid down, but it is unnecessary. Indeed, there is no authority to the contrary. It is quite true that the prosecution cannot prove the commission of another and distinct felony by the prisoner for the purpose of establishing the fact directly that he committed the one for which he is then on trial, or for the purpose of raising any direct infer-

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ence in the affirmative of the principal issue. The civil law allows such evidence against a criminal on trial for the purpose of rendering it more probable that he is or may be guilty of the offence charged. But the common law, with more humanity and better logic, forbids such evidence in support of the principal issue, and limits its admission to minor issues, such as motive and *scienter*, and even then confines it to cases where there is some apparent connection or relation between the imputed motive or guilty knowledge and the felony proposed to be proved. There is no pretence that the jury were not fully and carefully instructed as to the proper object and office of the evidence complained of, nor is there the slightest reason to apprehend that it was either misunderstood or misapplied by them. I am clearly of opinion, therefore, that no error was committed in admitting the evidence for the purpose for which it was offered, and that no injustice has been done to the prisoner in its application by the jury. One or two other minor grounds were suggested on the application for the allowance of the writ, but they do not seem to me to raise any serious question for consideration, and could not, obviously, have operated in the slightest degree to the prejudice of the prisoner. Such being the case, as it presents itself to my mind, I am unable to see upon what grounds I can allow the application. The true rule to be observed, in granting or refusing such applications, by the judge to whom they are made, is well stated by Chancellor WALWORTH, in considering the application of John C. Colt to him for a similar writ, after his conviction for the murder of Adams, where he says that "it is the duty of the officer to whom the application is made to disallow the same, if he has no reason to doubt the legality of the conviction." (1 *Park. Cr. R.*, 611.) This is obviously the intention of the statute in causing the application to be made upon notice to the district attorney or to the attorney-general, and in not allowing the writ, as matter of right to the prisoner, after conviction.

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If I entertained any reasonable doubt as to the legality of the conviction, I should certainly give the prisoner the benefit of it, and allow the writ and stay the execution. But the case has been twice tried before me at the Oyer and Terminer, and I have been previously led to examine all the questions now presented, with much care and I may add with no little solicitude; and I entertain no doubt whatever, either of the legality of the conviction or of the justice of the verdict. Thus viewing the case and the questions involved in the application, I have not, as I conceive, the right to interpose and arrest the due execution of the judgment.

The application is therefore denied.

COURT OF APPEALS. Albany, June, 1858. Before *Johnson*, chief judge, and *Comstock*, *Selden*, *Denio*, *Roosevelt*, *Harris*, *Pratt* and *Strong*, Judges.

ALEXANDER BEHAN, plaintiff in error, *v.* THE PEOPLE,
defendants in error.

A violation of section thirteen, chapter six hundred and twenty-eight of the Laws of 1857, by selling strong or spiritous liquors or wines in quantities less than five gallons at a time, without license, is a misdemeanor, for which the offender may be proceeded against by complaint before a magistrate, or by indictment.

BEHAN was indicted and convicted, at the Onondaga General Sessions, of the offence of selling strong and spiritous liquors and wines, without having any license therefor, under section thirteen of chapter six hundred and twenty-eight of the Laws of 1857, being the act to suppress intemperance, and to regulate the sale of intoxicating liquors. The judgment was, on appeal, affirmed by the Supreme Court

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at general term in the fifth district, and the defendant appealed to this court.

Sheldon & Brown, for plaintiff in error.

Henry S. Fuller (District Attorney), for the defendants in error.

By the Court, PRATT, J.—It is well settled that where an act is prohibited by statute, which is not criminal at common law, and a penalty is imposed in the same statute, declaring such prohibition, the act is not indictable. The principle was distinctly recognized in the case of *The People v. Smith* (13 *Wend.*, 341). It is based upon the assumption that the legislature, having fixed the penalty at the same time of prohibiting the act, designed that there should be no other punishment. But where the act was criminal at common law, or already prohibited by a former statute, the imposition of a civil penalty would not take away the power to punish by indictment. So, when the statute itself contains any provisions showing that the legislature did not intend that the civil penalty should constitute the only punishment, the remedy by indictment would not be taken away.

Hence, if a statute direct that the prosecutor may proceed in a certain way, or otherwise, as "if a statute give a recovery by action of debt, bill, plaint or information, or otherwise," it authorizes a proceeding by indictment. (*Arch. Cr. Pl.*, 1, 2; *Hawk.*, ch. 25, § 4; *Griffith v. Wells*, 5 *Denio*, 227.)

In fine, it is simply a question of legislative intent. In looking, therefore, at the statute in question in its whole scope and bearing, and in connection with previous legislation upon the same subject, can we infer an intention on the part of the legislature to confine the remedy for a violation of its provisions in selling without a license, to the civil penalty therein imposed, or is the intention manifest that

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the offender shall also be punishable by indictment. Upon a careful examination of the statute, it seems to me that the conclusion is irresistible that the latter was the intention of the legislature.

First. It has been the policy of the state, at least since the year 1801, if not before, to make offences against the excise laws punishable by indictment. By the seventeenth section of the Act of 1801, to lay a duty on strong liquors, "and for regulating inns and taverns," all offences against any of the provisions of the act were declared to be misdemeanors. This provision has been continued from that time down to the enactment of the prohibitory law in 1855. The presumption, therefore, is against the design on the part of the legislature, in the restoration of the license laws, to change a policy so long adhered to. It should require a clear expression of the legislative will to that effect to justify the courts in holding that offences against those laws are no longer indictable.

The act under consideration, in its leading characteristics, is very similar to the old excise laws, both in its prohibitions and its penalties. Under those laws, the selling in quantities less than five gallons was prohibited by penalties in substantially the same form as in the present act; and the Supreme Court, in the cases of *The People v. Stevens* (18 Wend., 341), and *The People v. Brown* (16 id., 561), held that selling the prohibited quantities without license, were offences against the provisions of the act, and therefor, misdemeanors, and indictable.

If, therefore, selling without license constituted offences against the provisions of that act, it is difficult to find any good reason why similar violations of the present statute should not also be deemed offences against its provisions; and if they are to be deemed offences no one will deny that they are indictable.

Second. The whole scope and character of the act shows that the term "offence," when it is used in connection with

those directions which are only applicable to misdemeanors, is not used in a limited sense, but was used to define all substantial violations of the provisions of the act.

By section sixteen, it is made the duty of certain officers therein enumerated, to arrest "all persons found actually engaged in the commission of *any offence in violation* of this act, and forthwith to carry such person before any magistrate," &c., who is to try them, or hold them to bail, as for any other misdemeanor triable by a Court of Special Sessions.

In a subsequent part of the same section it is made the duty of "the magistrate to entertain *any complaints of a violation of this act* made by any person under oath, and forthwith to issue a warrant and cause such offender to be brought before him to comply with the provisions of this section," &c. Here the term used is "*any complaint of a violation of this act*," and upon such complaint being made a warrant is to be issued. The term "offence," which the counsel for the prisoner insists only means those violations of the laws declared in the act itself to be misdemeanors, is not used, but the more general term, "*violation of this act*," and the proceedings directed to be taken by the magistrate are such as are applicable to cases of misdemeanors only.

So, by section twenty-ninth, it is made the duty of courts "to instruct grand jurors to inquire into *all offences* against the provisions of this act, and to present all offenders under this act." Now, it is not to be assumed that the legislature would have inserted so carefully in the act these special directions to police officers, magistrates and courts, in order to secure extraordinary vigilance in the detection and conviction of offenders against the three or four comparatively unimportant provisions of the act, which are specially declared to be misdemeanors.

Third. The act of selling without license is called, in those sections of the statute imposing the penalties, "offences."

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By section thirteenth, it is declared that "whoever shall sell any strong or spiritous liquors or wines, in quantities less, &c., shall forfeit \$50 for each offence." By section fourteenth, "whoever shall sell, to be drank in his house, &c., shall forfeit \$50 for each offence." In fine, all through the statute, violations of the provisions of the act are termed "offences." And it is a primary rule for the interpretation of statutes that when the same term or expression is used in different parts of the same statute it shall be deemed to have the same meaning, unless the contrary very plainly appears to have been the intention of the legislature. (*Smith on Stat.*, 673; *James v. Dubois*, 1 *Har.*, 285.)

The general statutory definition as given in the Revised Statutes, which is invoked by the prisoner's counsel in aid of the construction insisted upon by him, throws but little light upon that point. By that statute, the term "offence," when used in a statute, shall be construed to mean any offence for which any criminal punishment may by law be inflicted. Now, the question in controversy is, whether this particular violation of the act is punishable criminally. If so, the term "offence" applied to it would be in strict accordance with the statutory definition of the term. Again, as it already appears, the act itself calls this violation an "offence." Now, if the statutory definition of that term is of any force whatever to settle the question under examination, it is against the construction contended for on behalf of the prisoner; for the term, when used in any statute, is to be construed to mean any offence for which any criminal punishment may be inflicted. (2 *R. S.*, 886, § 37.)

Fourth. The only reasons which have been suggested in opposition to the views above expressed, worthy of consideration, are based upon the fact that the act itself declares some three or four of the violations of its provisions misdemeanors. It is insisted that the maxim "*expressio unius est exclusio alterius*," in its legal application to this statute would exclude the assumption that any other offences were designed

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to be deemed misdemeanors. In a statute which appears to have been carefully drawn up, and all its provisions carefully considered, I should be inclined to give great force to that maxim. But the statute under consideration appears upon its face to have been very carelessly framed, and to have been adopted without a very careful consideration of its provisions. In such case it would not be safe to give that maxim much force. It would be much safer to look at the general scope and purpose of the act, and to search there for an expression of the legislative intention; and in looking over all the provisions of the act in their general scope and tenor, I cannot resist the conviction that offences against its provisions were designed to be punishable as misdemeanors.

Upon the whole, we are satisfied that it was not the design of the legislature to limit the punishment of the violation of the act in question to the penalty imposed therein, but to authorize a proceeding by complaint before a magistrate, or by indictment.

Judgment affirmed.

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A.

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See EVIDENCE.
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ARREST.

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ARSON.

1. To convict a person of arson in the second degree, under section two of article one, title three, chapter one, of part four, of the Revised Statutes, by which it is enacted that "every person who shall willfully set fire to or burn, in the night-time, any shop, warehouse, or other building, not being the subject of arson in the first degree, but *adjoining* to or within the curtilage of any inhabited dwelling-house, so that such house shall be endangered by such firing, shall, upon conviction, be adjudged guilty of arson in the second degree;" it is necessary to prove that the building set fire to actually touched an inhabited dwelling-house, or that it was within the curtilage thereof; *adjoining* in the section quoted signifies *actual contact*. *Peverelly v. The People*, 59
2. Form of an indictment for an attempt to commit arson in the second degree, by firing a warehouse adjoining to an inhabited dwelling-house. 4b

ASSAULT AND BATTERY.

1. Under the thirty-fifth section of the act of 1850, entitled "An act to authorize the formation of railroad corporations, and to regulate the same," a conductor of a train is protected against an indictment for assault and battery, for putting out of the cars a passenger who refuses to pay his fare, if he use no unnecessary force; and where a passenger has refused to pay his fare, and the train has been stopped for the purpose of putting him out of the cars, the right of the conductor to put him out is not taken away by his then offering to pay the fare. *The People v. Jilson*, 284
2. The relations and rights of a passenger, as regards the railroad company in whose cars he travels, discussed by MULLETT, J. 4b
3. On trial of an indictment for an assault and battery, it is a good defence that the complainant had committed petit larceny, and that the alleged assault and battery consisted in arresting him therefor, without process, and delivering him to a public officer. *The People v. Adler*, 249
4. On the trial of an indictment for an assault and battery, it appeared that the defendant was a conductor on a railroad, and that the act complained of was committed in forcibly ejecting a passenger from a car before he had reached the station for which he had purchased his ticket, one ground of defence being that the passenger had conducted

himself in a violent and disorderly manner, so as seriously to disquiet the other passengers, held that it was competent for the defendant to prove the passenger guilty of such misconduct during any part of his entire passage, it being a short one, and that it was erroneous to restrict the evidence to the last three miles of the passage. *The People v. Caryl*, 826

5. It is erroneous to charge that a conductor on a railroad has no authority to eject a passenger from the car for misconduct, except when it is such as to disturb the peace and safety of the other passengers. Grossly profane or indecent language may be a sufficient ground for expulsion. *ib*

6. When the regulation of a railroad company as to the place of collecting tickets from the passengers on a railroad, is a reasonable one, and a passenger refuses to comply with it, it is the right of the conductor to require the passenger to leave the cars, and if he refuses to go, he may be ejected without unnecessary violence. *ib*

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B.

BAIL.

1. If a police justice in the city of New-York willfully and intentionally take bail and discharge from custody a person committed on a criminal charge by another magistrate, without the notice to the district attorney required by the act of 1846, and without having before him the papers required by that act, he is guilty of a misdemeanor, under the provisions of 2 *Revised Statutes*, 696, § 89. *The People v. Bogart*, 143

2. A police justice in the city of New-York acquires no jurisdiction and has no authority to take bail and discharge from custody till the preliminary steps required by the act of 1846 have been duly taken, and until such steps are taken his acts

in taking bail and discharging from custody are not judicial acts and cannot be protected as such. *ib*

3. In an indictment of a police justice for such an offence, it is not necessary to prove that the act was done corruptly. The statute is violated and the penalty incurred if the act be done intentionally. *ib*

4. "Straw bail" defined by the city judge in his charge to the jury. *ib*

5. Upon a question of bail before indictment on a charge of murder, where the accused, having been committed by the coroner, is brought before a justice of this court on *habeas corpus*, examinations before the coroner may and should be looked into, to ascertain whether a crime has been committed, and if so, the strength of the proofs in support of it; and if such examinations show that the crime, if any, does not exceed the grade of manslaughter, and a fair doubt exists whether the defendant has committed any felony, bail should be taken. *The People v. Beigler*, 816

6. The action of a committing magistrate is not final on the question of admitting to bail. *The People v. Cunningham*, 520

7. Where the crime charged and the circumstances are such that a bail bond will afford reasonable assurance that the accused will appear to stand trial, it is his right that the bond should be accepted in lieu of his personal detention. *ib*

8. The right to detain for trial, being a restraint upon personal liberty, is limited to the necessities of society, and when other adequate security can be had, the necessity for personal detention does not arise, and a resort to it is not warranted by law, but is illegal, unjust and oppressive. *ib*

9. In determining whether such security would be adequate, it is necessary to consider the nature of the offence charged, the probabilities of conviction, the penalty to follow

it, and the position, sex, social and family relations, and pecuniary means of the accused. *ib*

10. Though the action of a committing magistrate or court, on the question of admitting to bail, is the subject of review by an appellate jurisdiction, yet it is final as to other magistrates or courts of coordinate or concurrent authority on the same question. *The People v. Cunningham*, 581

11. Where bail had been refused by the committing magistrate, and also by the Court of General Sessions, in which court the indictment was pending, and a justice of the Supreme Court afterwards decided, at chambers, to admit to bail, the decision of the justice was reversed, on *certiorari*, by the Supreme Court, sitting in general term, on the ground that the question was *res judicata* when brought before the justice of the Supreme Court. *ib*

12. But when bail has been refused on account of insufficiency, the decision does not preclude a new application for a discharge on offering other bail. *ib*

13. Forms of writ of *certiorari*, for review of decision of judge at chambers admitting to bail, allowance of writ, and affidavit on which writ was allowed. *ib*

See INTOXICATION.

DISORDERLY PERSON.

BAWDY-HOUSE.

See DISORDERLY PERSON.

BOARD OF HEALTH.

1. The board of health of the town of Castleton, of the county of Richmond, has no power to make a regulation prohibiting all persons from passing from within the quarantine inclosure, situated in that town, into any other part of the town. Such a regulation is in conflict with the powers conferred by the state on the officers of the qua-

rantine establishment: and where a person had been arrested and committed, charged with a misdemeanor for violating such a regulation, he was discharged on *habeas corpus*. *The People v. Roff*, 216

2. The powers of a board of health organized under chapter three hundred and twenty-four of the Laws of 1850, considered and explained. *ib*

BURGLARY.

1. An indictment for burglary in the second degree, charging the felonious breaking and entering of the "house" of E. B. P., with intent, &c., was adjudged sufficient, on writ of error, it being held that the word "house" in its primary and common acceptation, meant a "dwelling-house." *Thompson v. The People*, 208

2. On the trial of an indictment for burglary, it appeared that the building in question was owned by G., that there were several apartments in the house, all of which were occupied by tenants, the outer or hall door being common to all the occupants, and of these apartments, the one alleged to have been broken and entered, was occupied by W.; held, that the apartment alleged to have been broken and entered, was properly laid in the indictment, as the dwelling house of W. *The People v. Bush*, 552

3. Also, held, that in the absence of positive evidence on the point, whether the outer door and the door of the room in which the prisoner was found were latched, at the time of the entry of the prisoner, it was competent to prove that these doors were generally kept closed or shut, it having been shown that both the doors were latched ten or fifteen minutes previous to the alleged entry. *ib*

4. Opening a street door which is only latched, is a sufficient breaking to constitute burglary at the common law; but simply lifting the latch of an outer door, though still a sufficient breaking to constitute bur-

glary in an inferior degree, is not a breaking within the statute definition of burglary in the first degree. *ib*

C.

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1. Forms of complaint and warrant before a magistrate, and of a *certiorari* to remove proceedings after conviction before a Court of Special Sessions. *The People v. Carroll*, 78
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9. Forms of a writ of *certiorari*, for review of decision of judge at chambers admitting to bail; allowance of writ, and affidavit on which writ was allowed. *The People v. Cunningham*, 531

10. Form of an affidavit for the allowance of a writ of *certiorari* to remove into the Supreme Court, for review, a decision made on *habeas corpus* under 2 *Revised Statutes* (p. 573, § 69); also, form of such writ and return thereto, including proceedings on *habeas corpus* and *certiorari* to certify cause of detention. *The People v. Page*, 600

See PLACE OF TRIAL.
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CHALLENGE OF JURORS.

1. On the trial of an indictment for murder, a juror was challenged by the district attorney for principal cause, on the allegation that he was opposed to capital punishments; on being sworn the juror testified that he was opposed to the punishment of death, but said that if sworn as a juror on a trial for murder, and the evidence of guilt was clear, he should find the accused guilty; held that the challenge was not sustained. *The People v. Wilson*, 199
2. Where a challenge for principal cause, in such a case, had been made and tried, and the juror had been decided to be competent, it was held that the trial of the challenge might be opened, even after the juror had been sworn and taken his seat, and other jurors had been called, but before evidence in the cause had been taken, if it appeared that the juror had misunderstood the question put to him and had given a wrong answer, and that the juror desired to make the correction and to say that he could not, under any circumstances, convict on a charge of murder; and where, on resuming the trial of a challenge under such circumstances the juror repeated such correction,

the challenge was held well taken,
and the juror was set aside. 46

3. Where a juror is challenged to the favor, the triors are to decide whether he is, at the time of the trial, "altogether indifferent;" the inquiry is not confined to the state of the juror's mind before coming court, but if anything has occurred in court which has produced on his mind an impression of the guilt or innocence of the prisoner, it is a sufficient reason for finding the juror not to be indifferent between the parties. *Thompson v. The People*, 467

4. Under the statutes of the State of New-York, the people are entitled to two peremptory challenges. (This decision is in accordance with *The People v. Caniff*, 2 *Park. Cr. R.*, 586; and adverse to *The People v. Henries*, 1 *Park. Cr. R.*, 579.) *The People v. Masters*, 517

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1. Form of a commitment, by the recorder of New-York, of a person indicted in the Court of General Sessions for grand larceny. *The People v. Bogart*, 143
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3. A commitment issued upon a conviction before a Court of Special Sessions need not contain a statement that the defendant, when brought before the magistrate, requested to be tried before a Court of Special Sessions, nor that, having been required by the magistrate to give bail, the defendant omitted for twenty-four hours to do so, nor whether the defendant demanded a jury. *The People v. Moore*, 465
4. Such statements being no longer necessary in the record of conviction (2 *R. S.*, 771, § 88), are not required in the *mittimus*, which is merely the writ of execution for

the purpose of enforcing the judgment. 46

5. It seems that justices of the peace, in examinations upon complaints made before them in criminal cases, have no power to commit persons for refusing to be sworn as witnesses. *The People v. Webster*, 503

CONSTITUTIONAL RIGHT.

See TRIAL BY JURY.

DISORDERLY PERSON.

CORONER.

See JURISDICTION.

CORPUS DELICTI.

See MURDER.

COUNTY LIMITS.

See JURISDICTION.

D.

DIMINUTION.

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DISORDERLY PERSON.

1. On a complaint against a person as a disorderly person, if the charge be sustained, a magistrate may require sureties for good behavior for one year, and, in default of such sureties being given, may commit to jail; but he cannot proceed to organize a Court of Special Sessions, and, on conviction, punish the accused by fine and imprisonment. *The People v. Carroll*, 73
2. To warrant a conviction as a disorderly person, the complaint must bring the case within some of the

specifications enumerated in the statute as constituting the offence.

ib

8. Keeping a bawdy house was an indictable offence at common law, and a person accused of it was entitled to a trial by jury, that right being secured by the state constitution of 1821; the provision of the Revised Statutes (1 R. S., 638, § 1), by which keepers of bawdy houses are declared disorderly persons, and subjected to summary punishment, is unconstitutional and void. *Warren v. The People*, 544

4. The same constitutional provision being retained in the state constitution of 1846, a person arrested and brought before a magistrate has a right to give bail for his appearance before the next grand jury; and where such right was denied, and the defendant subjected to summary conviction before the justice, the conviction was reversed.

ib

5. Where a person was arrested on a warrant issued by a justice of the peace under the Revised Statutes, and chapter eighty-six, section fourteen of the Laws of 1855, as a disorderly person, for making a noise and disturbance of the public peace, &c., in a public place, and on being brought before such justice, pleaded guilty, and was thereupon sentenced to three months imprisonment in the county jail, and to pay a fine of \$25, and afterwards removed the proceedings by *certiorari* into the Supreme Court, and claimed a reversal of the conviction on the ground that it was an infringement of the provisions of the state constitution, securing a right of trial by jury, and declaring that no person shall be deprived of life, liberty or property without due process of law (*Const., art. 1, §§ 2 and 6*), it was held, that no such question could be raised on the record, the plaintiff in error having pleaded guilty, and that to have put himself in a position to raise the constitutional question, he should have pleaded not guilty, and demanded a trial by jury, or offered to give bail to appear before the next grand jury to answer to the charge, and

the conviction was affirmed. *Plato v. The People*, 586

E.

EMBEZZLEMENT.

1. Thirty-four tons of pig iron, in bars, each weighing about one hundred pounds, were intrusted to a common carrier, to transport on the canal from Albany to Buffalo. On the passage, the carrier stopped his boat in the night, and, with the assistance of one of his hands, and with a felonious intent, put off from the boat one hundred bars of the iron, and then proceeded and delivered the remainder of the iron at Buffalo; held, that the facts did not constitute larceny at common law, but that the carrier was guilty of embezzlement, under 2 Revised Statutes (p. 679, § 62). *The People v. Nichols*, 579

EVIDENCE.

1. It is the modern practice of the courts to receive the affidavits of the jurors themselves in answer to a charge of irregularity or abuse, though they have generally been considered as an unreliable species of evidence. *Eastwood v. The People*, 25
2. On the trial of an indictment for murder, alleged to have been committed by a blow inflicted by the prisoner with a club in a sudden affray, it is admissible to prove that the prisoner was intoxicated at the time of the transaction, and, for the purpose of establishing that fact, a witness who was present at the time and was well acquainted with the prisoner, after describing the appearance and conduct of the prisoner, may be permitted to give his opinion as to the fact whether or not the prisoner was intoxicated.

ib

8. On a trial before a Court of Special Sessions, a party cannot object that an answer to the question asked may involve the witness in a criminal prosecution. Such an objec-

tion can only be made by the witness. Nor can a witness claim such a privilege where the answer is necessary to a full understanding of the facts already voluntarily stated by the witness, although the answer may tend to criminate the witness. *The People v. Carroll*, 78

4. If a witness has testified to a part of a transaction or of a series of transactions which implicate the accused, the latter has a right to show, by a cross-examination of the same witness, that the criminality was on the part of the witness and not of the accused. *ib*

5. When it is necessary, on the trial of a cause, to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it is admissible in evidence, as part of the *res gesta*, for the purpose of showing its true character; but to render such declaration competent, the act with which it is connected should be pertinent to the issue; for when the act is, in its own nature, irrelevant, and when the declaration is, *per se*, incompetent, the union of the two will not render the declaration admissible. *The People v. Williams*, 84

6. Where, on the trial of A. W. for the alleged murder of his wife by poison, it appeared that he lived apart from his wife, and in the same town, and that his wife left her residence, on Saturday evening before her death, and returned home, at five o'clock the next morning, sick, and continued ill till she died, her symptoms being the same as in cases of poisoning; held, that it was not competent to prove what the deceased said, when she left home on Saturday evening, as to where she was going; and where such evidence was admitted, and it was proved that she said she was going with clothing for her husband, and the prisoner was convicted, it was held erroneous, and the judgment was reversed. *ib*

7. Where it was claimed by the prosecution that arsenic had been

administered to the deceased, in a bowl in which there had been tea and toast, which had been fed to her from the bowl by the prisoner, during her last illness, and there was evidence tending to identify the bowl as the same one delivered to the physician who had analyzed the contents at the request of the prosecution; held, that it was competent for the prosecution, at the trial, to prove by the physician the condition and contents of the bowl, and the analysis made by him of the contents, though the identification of the bowl by the witnesses was not positive, it being a question for the jury to decide whether the bowl was identified to their satisfaction. *ib*

8. On such a trial, it is proper, on the question of motive, to prove that the wife had, sometime previous to the alleged poisoning, entered a complaint against her husband, the prisoner, as a disorderly person, on the ground that he had abandoned his wife, and that the prisoner was arrested on such complaint, and gave a recognizance, with surety, on which he had been required to pay, and had paid, to the magistrate, weekly, the sum of \$2 for the support of his wife. *ib*

9. Where a paper, claimed to be such a recognizance, was produced in court, which purported to be signed by the prisoner and his surety, and to have been taken before a police justice, but had never been filed, and there was no evidence of its execution, except what might be inferred from the testimony of an agent of the governors of the almshouse who produced it, that weekly payments of \$2 had been made on it by the prisoner; held, that there was not sufficient proof of its execution to allow it to be read in evidence. *Per HAND and MITCHELL, Js.* *ib*

10. Where an inquiry into the condition of a person's health is material, any account given by such person relative to his health is evidence of complaints and symptoms; but it is not evidence to charge any other person as the cause of those sufferings. *Per CLERKE, J.* *ib*

11. To authorize any further proof of the statements and declarations made by a person during his last illness, it is necessary to show that they were made under the apprehension of death, and that the deceased was conscious of approaching and inevitable death; and it is not necessary that such consciousness should be uttered in express terms, but it may be inferred from the tenor of his conversation, the nature of his sufferings, and his whole demeanor. *Per* CLERKE, J. ib
12. Symptoms of poisoning by arsenic, as described by witnesses and proved by a physician. ib
13. Mode of conducting a *post mortem* examination in such a case, as described by a physician. ib
14. The presumption of dereliction, applicable to lost inanimate chattels, does not apply to stray domestic animals, as to which there is always supposed to be an *animus revertendi*. *The People v. Kaatz*, 129
15. When, on a criminal trial, the court was asked by the prisoner's counsel to charge "that the case being one of circumstantial evidence, the jury must acquit unless the circumstances exclude every other reasonable hypothesis except that of the prisoner's guilt," and the court refused so to charge, it was held that no error was committed, it appearing that the case was not one of circumstantial evidence alone, but that there was also direct and positive evidence against the prisoner. ib
16. On the trial of a police justice of the city of New-York, for having willfully taken bail of and discharged from custody a person committed on a charge of larceny by another magistrate, without notice given to the district attorney, as required by the *Session Laws of 1846* (p. 408), it is competent for the prosecution to prove that, after such bail had been taken, search was made for the surety in the recognizance at the place of his alleged residence, and at other places and that he could not be found. *The People v. Bogart*, 148
17. When a brother-in-law of the deceased was called to show that five months after the alleged murder, he saw and examined a body which was found, and was claimed to be the body of the deceased, and proceeded to testify to several points of resemblance between the body found and the person charged to have been murdered, and was then asked by the counsel for the prosecution whether, in his opinion, it was the body of the person alleged to have been murdered, it was held, that the question was incompetent, and that it was the province of the jury and not of the witness, to draw the conclusion from the points of resemblance, and to decide upon the identity of the body found, it appearing that the body found had been much decomposed and changed, and that all the remaining points of resemblance had been stated by the witness to the jury. *The People v. Wilson*, 199
18. Where, on the arrest of a prisoner, he made confessions to the officer, admitting his guilt, the officer having made no promises and no threats, such confessions were held competent evidence, although it appeared that the prisoner was very much frightened, and seemed much terrified at the time they were made, and although the statements of the prisoner were made partly in English and partly in German, and the witness called to prove the confessions did not understand what was said in German. *Per* DEAN, J. *The People v. Thomas*, 256
19. Where a physician who had heard all the evidence, and who saw and examined the defendant on the ninth day of July, two days after the homicide, had testified that the prisoner was then deranged, and that he thought *delirium tremens* was the cause of his insanity, and the court had not permitted the witness to answer whether, in his opinion, founded on such personal examination, the same state of mind had existed on the night of the seventh of July, or what was

- the state of the defendant's mind on the night of the seventh of July, but had permitted the witness to state how long he thought the defendant, when he saw him, had been in such a state of *delirium tremens*, it was held that no error had been committed. *McCann v. The People*, 272
20. Where the counsel for the defendant asked a medical witness, who had heard all the evidence, what in his opinion, the facts stated by the witnesses on the trial, supposing them to be true, showed as to the state of the defendant's mind on the night of the seventh of July, when the homicide took place, and the evidence was excluded by the court, but at the same time the court decided that the witness might be asked his opinion upon a hypothetical case corresponding to the testimony, or that the testimony might be read to the witness and his opinion asked upon it, on the supposition that those facts were true, it was held that, inasmuch as the question permitted to be asked was substantially, in its effect and scope, like the one which had been excluded, no error had been committed. *Per HARRIS, J.* 26
21. What is the proper mode of examining a medical witness on a question of insanity, stated by HARRIS, J. 26
22. It is not competent on such a trial to give evidence, on the part the prosecution, of the general temperance and sobriety of the passenger ejected. His conduct on the passage is alone in question. *The People v. Caryl*. 326
23. Where, on the trial of such indictment, it was one of the grounds of defence that the passenger improperly refused to surrender his ticket, when requested by the conductor to do so, it was held to be proper for the defendant to prove what was the regulation and custom of the company, as to the place of collecting tickets for the station to which the passenger was going. 26
24. On the trial of an indictment for receiving stolen goods, knowing them to be stolen, it is competent for the prosecution to give in evidence a series of acts of the like character, for the purpose of showing the *scienter* of the accused, or to rebut any presumption of innocent mistake. *The People v. Rando*, 835
25. On the trial of such an indictment, it is not competent for the prisoner to prove what was said to the clerk of the defendant by the persons who delivered the stolen property to him, at the time of the delivery, on the premises of the defendant. *PRABODY, J.*, dissenting. 26
26. Application for naturalization must be made in open court, and evidence of residence, &c., must be taken by the oral examination of witnesses, and not by previously prepared affidavits. *Per PRATT, J. The People v. Sweetman*, 358
27. On the trial of an indictment for rape it is not competent, on the part of the defence, to prove acts of illicit sexual intercourse between the prosecutrix and persons other than the defendant, although the prosecutrix had previously been asked, on her cross-examination, in relation to such illicit acts, and had denied them. (This case overrules *The People v. Abbott*, 19 Wend., 192.) *The People v. Jackson*, 391
28. Direct evidence is not, in all cases indispensable for the purpose of proving the *corpus delicti*, on a trial for murder. *BALCOM, J.*, dissenting. *The People v. Ruloff*, 401
29. The *dictum* of Lord Hale, in 2 Hale P. C., 290, in which a contrary opinion is expressed, discussed and disapproved. 26
30. Where, on a trial for murder, there is no direct evidence of the *corpus delicti*, and it is evident that none can be adduced, the *corpus delicti* may be proved by circumstantial evidence, when it is so strong and intense as to produce the full

- certainty of death; but the death can be inferred, in such case, only from such strong and unequivocal circumstances as render it morally certain, and leave no ground for reasonable doubt. *BALCOM, J.*, dissenting. *ib*
81. The cases bearing on this point reviewed, and the rules and principles of circumstantial evidence discussed. *ib*
82. On the trial of an indictment for murder, the law, in its clemency, presumes the entire innocence of the prisoner; and the government, before it has a right to ask for a conviction, is bound not only to prove the alleged murder, but is required also to establish by evidence the guilt of the prisoner beyond a reasonable doubt. *Per MASON, J.* *ib*
83. The *corpus delicti* is made up of two things: First. The fact that a human being has been killed; and Secondly. The existence of criminal and human agency as to the cause of the death. *Per MASON, J.* *ib*
84. In proving the confessions of a prisoner, it is required that all the confessions be taken together, as well that which makes for the prisoner as that which makes against him; but it is not necessary to adopt the whole confession, where other evidence in the case proves part of the confession to be untrue. *Per MASON, J.* *ib*
85. Confessions of a prisoner are a doubtful species of evidence, and should be received with great caution. *Per MASON, J.* *ib*
86. No man can be convicted of a criminal offence upon his own confession alone that a crime has been committed; confessions are competent evidence in the case, but alone are not sufficient. *Per MASON, J.* *ib*
- See ASSAULT AND BATTERY.
RAILROADS.
37. On the trial of an indictment for feloniously receiving and having stolen goods, where a witness called by the prosecution had testified that he called on the defendants and found the stolen property in their possession, and purchased it of them for a much less sum than its value, and had, at the time, in his possession, a memorandum of the goods which had been stolen, it is competent for the prosecution, for the purpose of showing the true position of the witness in the transaction, to show by him that he had previously received the memorandum from the person from whom the property had been stolen, and that he also got the money with which he bought the property from the person from whom it had been stolen. *Wills, et al., v. The People,* 473
38. What facts and circumstances are sufficient to justify the court in refusing to discharge one of the defendants, on the trial of such an indictment, where a clear case of guilt was made out against the other defendant, both being claimed to have acted in concert, stated in the history of the case, and commented on by MITCHELL, J. *ib*
89. Where the bulk of the stolen goods was found, in Williamsburgh, in a house apparently kept for storing and concealing goods, but a portion of the goods, used as samples, was found at the store and place of business of the defendants in New-York, at which place Wills, one of the defendants, exhibited to a witness, and offered to sell him, the whole of the goods, and the samples, before they were exhibited to the witness, were brought in by Conley, another defendant, after an absence of only fifteen minutes from the time he was sent for them by Wills, it was held, on the trial of an indictment found in the city of New-York, that the Court of General Sessions were right in overruling a motion to dismiss the case, or to direct the jury to acquit the prisoners, which motion was made on the ground that it was not shown that they had received or had the goods in question, within the city and county of New-York. *ib*
40. On the trial of an indictment for receiving stolen goods, knowing

them to be stolen, it is not competent for the defendant, for the purpose of proving that when he received the goods he had no knowledge of their being stolen, to prove what the person from whom he received the goods said as to the manner in which such person became possessed of the property. *ib*

41. Where a witness on the part of the prosecution had been asked, on his cross-examination, if one of the defendants had not made a certain remark to him, or in his hearing, and at a certain time and place, and had testified that he had not, it is not competent for such defendant to prove, by another witness, that he, the defendant, did make such remark at the time and place in question. What such defendant had said was immaterial and incompetent, and could not be made competent, even for the purpose of impeachment, because the witness for the prosecution denied it. *ib*
42. Where a witness, called by the defendants, testified that he saw in the store of the defendants samples of the property alleged to have been stolen, it is not competent for the defendants to prove by the witness what was said by one of the defendants then present "as to what the property was doing there." *ib*
43. Where, on the trial of an indictment for manslaughter, alleged to have been committed in causing death by effecting an abortion, it was shown that the defendant had said to A. A., who was on her way to see Mrs. L., then stated to be pregnant, that he would effect an abortion upon Mrs. L. for \$25, and it appeared that A. A. went immediately to the residence of Mrs. L.; held, that it was not erroneous to permit the prosecution to prove the fact that a conversation on the subject took place between A. A. and Mrs. L., without stating the details of the conversation, though the defendant was not present. *Hunt v. The People*, 569
44. And inasmuch as it further appeared that Mrs. L. returned with A. A. immediately to the place of

defendant, where the defendant operated on Mrs. L. and produced the abortion, and it appeared satisfactorily that the defendant had intended that what he said should be communicated by A. A. to Mrs. L., though it was not authorized in express terms; held, further that it would have been competent to prove that A. A. communicated to Mrs. L. what the defendant had said on the subject, and to give the details of such communication. *Per CLEBEE, J.* *ib*

45. A witness, called and examined on behalf of the defendant, having testified, without objection from the district attorney, to a conversation she had with the deceased Mrs. L. a day or two before her death, during which the deceased informed the witness that her illness was caused by miscarriage, and that the miscarriage had been brought about by natural causes; held, that though such evidence would have been inadmissible if objected to, yet, having been received, it was competent for the district attorney to meet it by proof that the deceased was out of her mind when she made such declarations. *ib*
46. The declarations of a party as to the state of his health are, under some circumstances, admissible in evidence in his own behalf, but they are confined to his condition at the moment of speaking, and cannot be extended to past matters. *ib*
47. Where, on the trial of an indictment, evidence has been improperly received and excepted to, and it appears that the jury was subsequently instructed by the court in its charge to disregard such evidence, it was held that the erroneous decision in receiving the evidence was no ground for reversing the judgment. *ib*
48. Where, on a trial for larceny, the prosecutor, on his cross-examination by the prisoner's counsel, was asked if he had not said to one Emly that he "did not think the prisoner intended to do anything

- wrong, but wanted to climb too high," and answered that he did "not recollect it," and that he did "not know that he had said so;" and afterwards, on the trial, Emly was called as a witness for the prisoner and asked whether the prosecutor had ever said so to him, and the district attorney objected generally to the evidence, and it was excluded, such exclusion was held to be erroneous. *The People v. Jackson*, 590
49. In such a case, the party making the objection cannot be permitted, on review, to avail himself of the position that the previous question was not sufficiently precise as to time and place, because the objection at the trial was not put on that ground. *ib*
50. At common law, the information obtained by physicians in their professional intercourse with patients was not privileged from disclosure. *The People v. Stout*, 670
51. The provisions of the Revised Statutes on that subject (2 R. S., 406, § 73), are intended to establish, between physician and patient, the same rule as that existing between attorney and client. *ib*
52. The "information," of which the statute forbids the disclosure, is not confined to communications made by the patient, but extends to all facts which necessarily come to the knowledge of the physician in a professional case. *ib*
53. The statute is for the protection of the patient and not the physician, and being of a remedial nature, it should be construed liberally and with reference to the evil it was designed to remedy. *ib*
54. To bring a case within the protection of the statute it is not necessary that the technical relation of physician and patient should exist; but the statute is applicable where a physician has attended upon a person under circumstances calculated to induce the opinion that his visit was of a professional nature, and the visit was so regarded and acted upon by the person so attended. *ib*
55. Where a person had been arrested and confined in jail, on a charge of murder, and was in a disabled and shattered bodily condition, and two physicians were sent by the coroner to the jail to examine the injuries of such prisoner, who informed him of the object of their visit, and whom he knew to be physicians, and the prisoner consented and submitted to such examination, and answered all the questions asked him, and requested one of the physicians, as he was leaving, to call again the next day. It was held, on the trial of the prisoner for the murder charged, that the case was within the statute, and that such physicians, who were called as witnesses, could not be permitted to disclose any information they acquired on such visit to the prisoner. *ib*
56. On a trial for felony, separate and distinct felonies cannot be proved for the purpose of establishing the fact directly, that the prisoner committed the offence for which he is on trial, or for the purpose of raising any direct inference in the affirmative as to the principal issue; but such evidence is competent for the purpose of proving the existence of a motive to commit the crime in question, in cases where there is some apparent connection or relation between the imputed motive and the felonies proposed to be proved. *The People v. Wood*, 681
57. Motive is a minor or auxiliary fact, from which, when established in connection with other necessary facts, the main or primary fact of guilt may be inferred, and it may be established by circumstantial evidence, the same as any other fact. *ib*
58. It does not lie with the prisoner to object that the fact proposed as a circumstance is so heinous in its nature, and so prejudicial to his character, that it shall not be used as evidence against him, if it bears upon the fact in issue. *ib*
59. The proper inquiry when the circumstance is offered is, does it fairly tend to raise an inference in favor of the existence of the fact proposed to be established? If it does

it is admissible, whether such circumstance be innocent or criminal in its character. *ib*

See SELLING UNWHOLESOME FOOD.
BURGLARY.

EXCISE LAW.

1. In an indictment against two persons, for selling liquor in violation of the excise laws, it is no defence to one that he did the acts complained of as a clerk of the other defendant, and by his direction, there being no allegation that the illegal acts were done by compulsion. *French et al., v. The People.* 114.
2. Form of an indictment for a violation of the fifteenth and sixteenth sections of the statute entitled "Of excise, and the regulation of taverns and groceries," (1 R. S., 854), of special pleas to the same, and of demurrer and joinder. *ib*
3. The act entitled "An act for the prevention of intemperance, pauperism and crime" being unconstitutional, the provisions of the Revised Statutes on the subject were left in full force, notwithstanding the clause in the act repealing all previous statutes inconsistent with its provisions. *The People v. Tiphaine,* 241
4. Under the "act to suppress intemperance and to regulate the sale of intoxicating liquors," passed April 16, 1857, the commissioners of excise have not power to sit more than ten days for the purpose of receiving and deciding upon applications for license. *The People v. the Commissioners of Excise of Albany,* 501
5. Selling liquor without a license is an indictable offence, and punishable as a misdemeanor, under the act of April 16, 1857, entitled "An act to suppress intemperance, and to regulate the sale of intoxicating liquors." *The People v. Shea,* 562
6. Where a statute prohibits an act which is not criminal at common law, and imposes a civil penalty for its commission, the act is not

indictable; but if, at the time of the enacting of the statute, it was already prohibited by a former statute, and the statute imposing the penalty contains provisions showing that the legislature did not intend that the civil penalty should constitute the only punishment, it may, in addition to the penalty, be also punished as a misdemeanor. *ib*

7. The provision of section sixteen of the "act to suppress intemperance, and regulate the sale of intoxicating liquors," passed April 16, 1857 (*Laws of 1857, ch. 628*), by which the sum of one hundred dollars is prescribed as the penalty of the bond to be taken where a person is arrested and brought before a magistrate, charged with being found actually engaged in violating that act, is not applicable to the case of a person indicted under the twenty-first section of that act, and afterwards arrested under the indictment. In the latter case the amount of bail is not fixed by statute, but is left to the discretion of the magistrate. *The People v. Page,* 600
8. The twenty-first section of the act, which declares it a misdemeanor for an inn, tavern or hotel keeper or person licensed to sell liquors, to sell or give away any intoxicating liquors or wines on Sunday, is not applicable to persons other than those thus designated; and it is not, therefore, an indictable offence, under the statute, to sell or give away intoxicating liquors or wines on Sunday, when the act is done by a person who is not licensed to sell liquors, or who is not the keeper of an inn, tavern or hotel. *ib*
9. For the selling of such liquors on Sunday, by persons not enumerated in the twenty-first section, the only punishment is the infliction of a money penalty provided for selling without a license by other sections of the act, and there is no distinction in the kind of punishment, whether the sale be made on Sunday or on any other day of the week. *ib*
10. A violation of section thirteen, chapter six hundred and twenty-eight of the Laws of 1857, by sell-

ing strong or spiritous liquors or wines in quantities less than five gallons at a time, without license, is a misdemeanor, for which the offender may be proceeded against by complaint before a magistrate, or by indictment. *Behan v. The People*, 686

See STRONG AND SPIRITUOUS LIQUORS.
INTOXICATION.

F.

FELONY.

1. A private person is permitted by law to arrest without warrant and take before a magistrate one who has committed a felony; but for mere misdemeanors, after their commission, an arrest can be only made upon a warrant from a magistrate. *The People v. Adler*, 249
2. The common law rule that petit larceny is a felony has not been changed by the Revised Statutes. 4b

FORGERY.

1. On the trial of a person charged with having in his possession an altered and forged bank-bill, with intent to pass the same as true, it is not competent for the prosecution to prove that, on searching the prisoner's wife, immediately after his arrest, there were found in her pockets parts of bank-bills, apparently cut for the purpose of making similar alterations, there being no evidence of any concert between the prisoner and his wife, or that they were mutually engaged in altering bank-bills, or that either of them had any knowledge of the facts proved against the other; and where such evidence had been received, and the prisoner was convicted, the judgment was reversed. *The People v. Thoms*, 256
2. Form of an indictment for having in possession an altered and forged bank-bill, with intent to pass the same, the bill purporting to have

been issued by a bank in another state. 4b

FORMER TRIAL.

1. The question whether a former trial and conviction for abduction are a bar to an indictment subsequently found for murder alleged to have been previously committed, cannot be raised and made a ground for discharge on *habeas corpus*. Such defence can only be made available, if at all, on the trial of the indictment for murder. *The People v. Ruloff*, 126
2. Held, also, that a trial and acquittal for larceny, on these facts, was no bar to a subsequent conviction for embezzlement on the same facts. *The People v. Nichols*, 579

H.

HABEAS CORPUS.

1. The question whether a former trial and conviction for abduction are a bar to an indictment subsequently found for murder alleged to have been previously committed, cannot be raised and made a ground for discharge on *habeas corpus*. Such defence can only be made available, if at all, on the trial of the indictment for murder. *The People v. Ruloff*, 126
2. Upon a question of bail before indictment on a charge of murder, where the accused, having been committed by the coroner, is brought before a justice of this court on *habeas corpus*, examinations before the coroner may and should be looked into, to ascertain whether a crime has been committed, and if so, the strength of the proofs in support of it; and if such examinations show that the crime, if any, does not exceed the grade of manslaughter, and a fair doubt exists whether the defendant has committed any felony, bail should be taken. *The People v. Beigler*, 816
3. A conviction for misdemeanor, before a Court of Special Sessions,

cannot be reviewed on a return to a writ of *habeas corpus*. *The People v. Shea*, 562

4. Where it appears, by a return to a writ of *habeas corpus*, that the prisoner in whose behalf it was sued out is detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, it is the duty of the officer before whom the writ is returned, forthwith to remand the prisoner. 53

See BOARD OF HEALTH.
MISDEMEANOR.

I.

INDICTMENT.

1. Where the indictment charged the sale of "strong and spirituous liquors" without license, and, among other liquors, "one pint of strong beer," and the proof, without further explanation, was, that the defendant sold "Dutch beer," it was held that the variance was immaterial. *The People v. Wheelock*, 9
2. The word "ravish" is necessary in charging the offence in an indictment for rape, and its omission will, after conviction, be ground for reversal on error. *Gouglemann v. The People*, 16
3. Form of an indictment for an attempt to commit arson in the second degree, by firing a warehouse adjoining to an inhabited dwelling-house. *Peverselly v. The People*, 59
4. Form of an indictment for murder by poison, and of a certificate of a justice of the Supreme Court allowing a writ of error and staying proceedings. *The People v. Williams*, 84
5. Form of an indictment for a violation of the fifteenth and sixteenth sections of the statute entitled "Of excise, and the regulation of taverns and groceries" (1 R. S., 854), of special pleas to the same, and of

demurrer and joinder. *French v. The People*, 114

6. Form of an indictment against a justice of the peace for a misdemeanor in willfully admitting a prisoner to bail, in the city of New-York, without notice to the district attorney, in a case in which the defendant was not the committing magistrate. *The People v. Bogart*, 148
7. In charging, in an indictment, a statutory offence, it is not necessary to follow the precise language of the statute, but words of equivalent import are sufficient. *Thompson v. The People*, 208
8. An indictment for burglary in the second degree, charging the felonious breaking and entering of the "house" of E. B. P., with intent, &c., was adjudged sufficient, on writ of error, it being held that the word "house," in its primary and common acceptation, meant a "dwelling-house." 53
9. After conviction and sentence, it is too late to question the indictment, if it contain the substance of the offence, so that the defendant have intelligible notice of the charge made against him. 53
10. Form of an indictment for having in possession an altered and forged bank-bill, with intent to pass the same, the bill purporting to have been issued by a bank in another state. *The People v. Thoms*, 256
11. It is sufficient, in an indictment for petit larceny, charged as a second offence, to aver, generally, that the Court of Special Sessions, before which the defendant was convicted, had full and competent power and authority in the premises, without setting forth the particular facts showing jurisdiction. *The People v. Golden*, 380

See JURY, GRAND.
BAIL.

12. An omission, in such indictment, to state the facts which show jurisdiction, is only a formal defect, which is cured by the statute of

- jeofails*, and is not available on demurrer. ib
13. Form of an indictment for perjury, alleged to have been committed in a proceeding to obtain the naturalization of an alien, in a county court. *The People v. Sweetman*, 353
 14. Under an indictment for manslaughter, in the common law form, the accused may be convicted of manslaughter, as defined in the Revised Statutes, in any degree, according to the evidence. *The People v. Butler*, 377
 15. Form of an indictment for rape. *The People v. Jackson*, 391
 16. Form of an indictment for the murder of an infant child, whose name and the manner of whose death were unknown, with counts in various forms to meet the circumstantial evidence on which the prosecution relied to prove the *corpus delicti*. *The People v. Ruloff*, 401
 17. Form of an indictment for feloniously receiving and having stolen property, with counts charging some of the defendants as accessories. *Wills et al. v. The People*, 473
 18. Form of an indictment for perjury, committed in a civil action, tried before a justice of the peace. *The People v. McKinney*, 510
 19. On the trial of an indictment for burglary, it appeared that the building in question was owned by G.; that there were several apartments in the house, all of which were occupied by tenants, the outer or hall door being common to all the occupants; and of these apartments, the one alleged to have been broken and entered, was occupied by W.; held, that the apartment alleged to have been broken and entered was properly laid in the indictment as the dwelling-house of W. *The People v. Bush*, 552
 20. In an indictment for robbery in the first degree (2 E. S., 677, § 55), the defendant was charged with having feloniously assaulted J. D., on, &c., at, &c., and then and there feloniously putting him in fear and danger of his life, and then and there feloniously and violently stealing, taking and carrying away from his person and against his will, certain money of the said J. D., to wit, current bank bills of the value of fifteen dollars, and silver coin of the value of three dollars, of the goods and chattels of the said J. D., against, &c., and it was held sufficient, without setting forth the number and denomination of the bank bills and the amount secured thereby and remaining unsatisfied thereon, or the number and description of the pieces of silver coin. *The People v. Loop*, 559
 21. Form of an indictment for manslaughter in the second degree, for causing death by effecting an abortion, with a count for a misdemeanor in using an instrument with intent to procure a miscarriage. *Hunt v. The People*, 569
 22. It is no valid objection to an indictment for a violation of the twenty-first section of the act, that the defendant had not been first arrested and taken before a magistrate. *The People v. Page*, 600
 23. Form of an indictment for an assault and battery committed on an officer while engaged in the execution of his office, with a count for riotously and routously resisting the execution of process, and a count for resisting the execution of a search warrant under the Act of 1845 (ch. 69, § 17.) *The People v. Holcomb*, 656
- See SELLING UNWHOLESOME FOOD.
- ### INSANITY.
1. Where a physician, who had heard all the evidence, and who saw and examined the defendant on the ninth day of July, two days after the homicide, had testified that the prisoner was then deranged, and that he thought *delirium tremens* was the cause of his insanity, and the court had not permitted the witness to answer whether, in his opinion, founded on such personal

examination, the same state of mind had existed on the night of the seventh of July, or what was the state of the defendant's mind on the night of the seventh of July, but had permitted the witness to state how long he thought the defendant, when he saw him, had been in such a state of *delirium tremens*, it was held that no error had been committed. *McCann v. The People*, 272

2. Where the counsel for the defendant asked a medical witness, who had heard all the evidence, what, in his opinion, the facts stated by the witnesses on the trial, supposing them to be true, showed as to the state of the defendant's mind on the night of the seventh of July, when the homicide took place, and the evidence was excluded by the court, but, at the same time, the court decided that the witness might be asked his opinion upon a hypothetical case corresponding to the testimony, or that the testimony might be read to the witness, and his opinion asked upon it, on the supposition that those facts were true, it was held that, inasmuch as the question permitted to be asked was substantially, in its effect and scope, like the one which had been excluded, no error had been committed. *Per HARRIS, J.* 26
3. What is the proper mode of examining a medical witness on a question of insanity, stated by *HARRIS, J.* 26
4. Where the presiding judge had charged the jury that the defence of insanity must be proved beyond a reasonable doubt, and if the defendant had satisfied them beyond a reasonable doubt, so that they should find that at the time of the killing he was so far really insane as not to be responsible for the act, they should acquit him, but otherwise they must convict him, the charge was held not to be erroneous. 26

INTOXICATION.

1. On the trial of an indictment for murder, alleged to have been com-

mitted by a blow inflicted by the prisoner with a club in a sudden affray, it is admissible to prove that the prisoner was intoxicated at the time of the transaction; and for the purpose of establishing that fact, a witness who was present at the time and was well acquainted with the prisoner, after describing the appearance and conduct of the prisoner, may be permitted to give his opinion as to the fact whether or not the prisoner was intoxicated. *Eastwood v. The People*, 25

2. Under the act entitled "An act to suppress intemperance, and to regulate the sale of intoxicating liquors," passed April 16th, 1857, being intoxicated in any public place is a criminal offence; but it is not punishable summarily before a magistrate, unless the accused elects to be thus tried, the act having secured to him the right, in all cases, to give bail to appear before the next Court of Oyer and Terminer or Sessions, to be held in the county, and to be tried only upon indictment by a grand jury. *The People v. Putnam*, 386
3. Where a person, arrested and brought before a magistrate under the seventeenth section of the act entitled "An act to suppress intemperance and to regulate the sale of intoxicating liquors," passed April 16, 1857, refused to be sworn and examined as to the cause of his intoxication, the magistrate has no power to commit him to prison for such refusal. *The People v. Webster*, 508
4. On a trial for murder, where the intention of the prisoner is sought to be ascertained for the purpose of determining whether the offence is murder or manslaughter, the jury are authorized to take into consideration the intoxication of the prisoner, as bearing upon the question of intent. *Rogers v. The People*, 682
5. And where, on such a trial, the prisoner's counsel requested the court to charge "that if it appeared by the evidence that the condition of the prisoner from intoxication was such as to show

that there was no intent or motive to commit the crime of murder, that the jury should find a verdict of manslaughter," and the court refused so to charge, a new trial was granted. *ib*

6. Though, it is true, that if a man voluntarily make himself drunk, his drunkenness is no excuse for any crime he may commit while so intoxicated, yet, in homicides of different degrees according to intent, and in larcenies, forgeries and other crimes depending on intent or knowledge, the intoxication of the prisoner is, in many cases, a material circumstance for the consideration of the jury. *ib*

See STRONG AND SPIRITUOUS LIQUORS. EXCISE LAW.

J.

JURISDICTION.

1. On a trial before the Oyer and Terminer, in the county of Westchester, it appeared that the alleged murder had been perpetrated on board a vessel lying at anchor on Long Island Sound, about a quarter of a mile west of Hartt Island, northerly of a line connecting the extreme points of Hartt and City Island; held that the offence was committed within the county of Westchester. *The People v. Wilson*, 200
2. Every part of the State of New-York is included within some one of the counties enumerated in the statute. *ib*
3. Where a body of water in which the tide ebbs and flows, is situated between a range of islands and the main shore, and all are so near to each other that a person with the ordinary power of vision can see with the naked eye from point to point, on every part of the connecting line, what is doing on each, it is within the county bounded upon the high seas, according, to the rule which extends the jurisdiction of a county to a line running from one to the other of the *fauces terre*. *ib*
4. The jurisdiction conferred on the police justice of the city of Buffalo, by section thirty-five, chapter two hundred and thirty of the Session Laws of 1853, is only exclusive in respect to the other justices of said city, and does not take away the power of a coroner of the county of Erie to issue process, and to commit to prison under the provisions of the Revised Statutes. *The People v. Biegler*, 316
5. Under the act of congress, the county courts of the several counties of the State of New-York have jurisdiction of the naturalization of aliens. *Per Bacon, J. The People v. Sweetman*, 358
6. State courts, in entertaining jurisdiction of cases of naturalization, act exclusively under the laws of the United States, and should be deemed, *quoad hoc*, courts of the United States. *ib*
7. Willful false swearing, by a person giving material testimony in a naturalization proceeding, before a county court, is an offence against the laws of the United States, and punishable in the United States Courts, and not in the state courts. *ib*
8. The question of jurisdiction of certain offences, as between the courts of the United States and the state courts, discussed by PRATT, J. *ib*

JURY, GRAND.

1. It is not a sufficient reason for quashing an indictment that the list of persons from which the grand jury, which found it was drawn, contained, as originally prepared by the board of supervisors, the names of only two hundred and ninety-nine persons, instead of three hundred as required by the statute. *The People v. Harriott*, 112
2. The provisions of the Revised Statutes, relative to the primary examination of persons accused of crimes, do not limit the right of the people, through their officers, to institute accusations before the grand jury; and it is no defence to an indictment that, previous to the

complaint before the grand jury, there had been no preliminary proceedings before a magistrate. *French et al. v The People*, 114

See PRECEPT.

JURY, PETIT.

1. In civil cases, and cases of misdemeanor, if the jury separate, either with or without the leave of the court it will not vitiate the verdict without additional evidence of irregularity or abuse; but in criminal cases of a higher grade, and especially in capital cases, such a separation, for however short a time, will be fatal to a verdict against the prisoner, unless it be shown affirmatively on the part of the prosecution, by the clearest evidence and beyond a reasonable doubt, that no injury to the prisoner could have occurred in consequence of the separation. *Eastwood v. The People*. 25
2. It is the modern practice of the courts to receive the affidavits of the jurors themselves in answer to a charge of irregularity or abuse, though they have generally been considered as an unreliable species of evidence. 26
3. If, after a cause has been submitted in a capital case, a jury receive any kind of evidence which can have the most remote bearing on the case, it will be fatal to their verdict. 26
4. When in a capital case, after the testimony was closed, several of the members of the jury, while walking out for exercise, by leave of the court and in charge of an officer, visited and examined the place where the homicide occurred and in regard to which the witnesses had testified, it was held to be a sufficient reason for granting a new trial. 26
5. The statute requiring the District Attorney to issue a precept to the Sheriff, at least twenty days before the holding of a Court of Oyer and Terminer, if it is at all applicable to the stated terms of such courts held under the code, is merely di-

rectory, and an omission to issue it, inasmuch as it does not "tend to the prejudice of the defendant," will not invalidate the subsequent proceedings or judgment. *McCann v. The People*, 272

6. Where, at a stated term of a Court of Oyer and Terminer, an order was entered by direction of the court, adjourning the term until a future day, and also directing the sheriff to summon, "for the adjourned term of the court, sixty jurors (to be drawn in the usual way)," and, at the adjourned term, part of the number so drawn and summoned, and also a part of the panel which had been drawn and summoned for the regular term, appeared: and the jury which tried the cause was drawn from a box containing the names of both panels, and no objection was made to the regularity of the proceedings until after conviction, it was held, that though the proceeding was technically informal, in the direction given as to the drawing of the jurors, it furnished no good reason for setting aside the verdict or arresting judgment. *The People v. Cummings*, 343

See PLACE OF TRIAL.

L.

LARCENY.

1. The rule that larceny cannot be committed of goods accidentally lost, and of which the finder really supposes that the owner cannot be ascertained, is not applicable to cattle which have strayed from the inclosure of the owner upon the public highway; and where cattle were found upon the public highway, under such circumstances, and were driven by the finder to market, with the intention of converting them to his own use, he was adjudged guilty of larceny. *The People v. Kaatz*, 129
2. The presumption of dereliction, applicable to lost inanimate chattels, does not apply to stray domestic animals, as to which there is

always supposed to be an *animus revertendi*. *ib*

8. It is sufficient, in an indictment for petit larceny, charged as a second offence, to aver, generally, that the Court of Special Sessions, before which the defendant was convicted, had full and competent power and authority in the premises, without setting forth the particular facts showing jurisdiction. *The People v. Golden*, 830

4. An omission, in such indictment, to state the facts which show jurisdiction, is only a formal defect, which is cured by the statute of *jeofails*, and is not available on demurrer. *ib*

5. J., by falsely representing to S. that he had sold for S. a quantity of goods to R. H. & Co., induced S. to send the goods to the store of R. H. & Co. J. then went to R. H. & Co., with whom he had had, in fact, no dealings on account of S., and informed them that the goods were sent there by mistake, and induced them, by such misrepresentation, to deliver the goods to him, and took them away from the store of R. H. & Co. and converted them to his own use, held, that this was larceny, and not simply obtaining goods by false pretences. *The People v. Jackson*, 590

See COMMITMENT.
RECOGNIZANCE.
FELONY.
EMBEZZLEMENT.
EVIDENCE.

M.

MANSLAUGHTER.

1. Under an indictment for manslaughter, in the common law form, the accused may be convicted of manslaughter, as defined in the Revised Statutes, in any degree, according to the evidence. *The People v. Butler*, 377

2. In order to bring a case within the definition of manslaughter, in the

first degree, as defined in the Revised Statutes, it is necessary to show that the accused was committing or attempting to commit some other offence than that of intentional violence upon the person killed. *at*

3. Where, on the trial of an indictment, in the common law form, for manslaughter, the court charged the jury that if they were satisfied, from the evidence, that the deceased had come to her death by reason of blows or injuries inflicted upon her by the defendant, not in any self-defence, nor otherwise excusably or justifiably, they should find the defendant guilty of manslaughter in the first degree, the charge was held to be erroneous and the conviction was reversed. *ib*

4. Where, on the trial of an indictment for manslaughter, alleged to have been committed in causing death by effecting an abortion, it was shown that the defendant had said to A. A., who was on her way to see Mrs. L., then stated to be pregnant, that he would effect an abortion upon Mrs. L. for \$25, and it appeared that A. A. went immediately to the residence of Mrs. L.; held, that it was not erroneous to permit the prosecution to prove the fact that a conversation on the subject took place between A. A. and Mrs. L., without stating the details of the conversation, though the defendant was not present. *Hunt v. The People*, 569

5. And inasmuch as it further appeared that Mrs. L. returned with A. A. immediately to the place of defendant, where the defendant operated on Mrs. L. and produced the abortion, and it appeared satisfactorily that the defendant had intended that what he said should be communicated by A. A. to Mrs. L., though it was not authorized in express terms; held, further, that it would have been competent to prove that A. A. communicated to Mrs. L. what the defendant had said on the subject, and to give the details of such communication. *Per CLERKE, J.* *ib*

6. A witness, called and examined on behalf of the defendant, having

testified, without objection from the district attorney, to a conversation she had with the deceased Mrs. L. a day or two before her death, during which the deceased informed the witness that her illness was caused by miscarriage, and that the miscarriage had been brought about by natural causes; held, that though such evidence would have been inadmissible if objected to, yet, having been received, it was competent for the district attorney to meet it by proof that the deceased was out of her mind when she made such declarations. *ib*

7. Form of an indictment for manslaughter in the second degree, for causing death by effecting an abortion, with a count for misdemeanor in using an instrument with intent to procure a miscarriage. *ib*

MISDEMEANOR.

1. Where a statute prohibits an act which is not criminal at common law, and imposes a civil penalty for its commission, the act is not indictable; but if at the time of enacting the statute, it was already prohibited by a former statute, and the statute imposing the penalty contains provisions showing that the legislature did not intend that the civil penalty should constitute the only punishment, it may in addition to the penalty, be also punished as a misdemeanor. *The People v. Shea*, 562

See EXCISE LAW.

SELLING UNWHOLESOME FOOD.

MURDER.

1. In civil cases, and cases of misdemeanor, if the jury separate, either with or without the leave of the court, it will not vitiate the verdict without additional evidence of irregularity or abuse; but in criminal cases of a higher grade, and especially in capital cases, such a separation, for however short a time, will be fatal to a verdict against the prisoner, unless it be shown affirmatively on the part of the prosecution, by the clearest evi-

dence and beyond a reasonable doubt, that no injury could have occurred in consequence of the separation. *Eastwood v. The People*. 25

2. If, after a cause has been submitted in a capital case, a jury receive any kind of evidence which can have the most remote bearing on the case, it will be fatal to their verdict. *ib*
3. When, in a capital case, after the testimony was closed, several of the members of the jury, while walking out for exercise, by leave of the court and in charge of an officer, visited and examined the place where the homicide occurred, and in regard to which the witnesses had testified, it was held to be a sufficient reason for granting a new trial. *ib*

4. Ordinarily, there can be no conviction for murder until the body of the deceased is discovered; held, that the circumstances of this case formed no exception to the rule. *The People v. Wilson*, 199

5. When, on the trial of a prisoner for the murder of his wife, the homicide was shown to have taken place on the 8th day of July, 1856, evidence on the part of the prosecution, given by a witness who resided next door to the prisoner from the autumn of 1855 till the last week of May, 1856, showing that during all that time the prisoner had frequently had difficulty and quarreled with his wife, was held to be admissible, as showing an alienation of affection, and as authorizing an inference, in the absence of other evidence, that the same state of feeling continued to exist after the witness ceased to have an opportunity of observing it. *McCann v. The People*, 272

6. Held, also, that upon the question of motive, it was competent for the prosecution to prove that in November, 1855, the deceased made a complaint against the defendant for assault and battery, upon which he was arrested and an examination was had, and the defendant was held to bail. *ib*

7. The prosecution was also permitted to prove that the deceased had deposited money in the savings bank in the fall of 1855, and again in June, 1856, and that a bank-book was issued to her in her own name and left with her sister at Newburgh and that the defendant complained that he had no money, and that his wife had taken the money and put it in bank, and that she had the bank-book, on the ground that such evidence tended to show both the existence and the source of the ill feeling of the defendant towards his wife. *ib*

8. Direct evidence is not, in all cases, indispensable for the purpose of proving the *corpus delicti*, on a trial for murder. BALCOM, J., dissenting. *The People v. Ruloff*, 401

The *dictum* of Lord Hale, in 2 Hale P. C., 290, in which a contrary opinion is expressed, discussed and disapproved. *ib*

10. Where, on a trial for murder, there is no direct evidence of the *corpus delicti*, and it is evident that none can be adduced, the *corpus delicti* may be proved by circumstantial evidence, when it is so strong and intense as to produce the full certainty of death; but the death can be inferred in such case, only from such strong and unequivocal circumstances as render it morally certain, and leave no ground for reasonable doubt. BALCOM, J., dissenting. *ib*

11. The cases bearing on this point reviewed, and the rules and principles of circumstantial evidence discussed. *ib*

12. On the trial of an indictment for murder, the law, in its clemency, presumes the entire innocence of the prisoner; and the government, before it has a right to ask for a conviction, is bound not only to prove the alleged murder, but is required also to establish by evidence the guilt of the prisoner beyond a reasonable doubt. *Per MASON, J.* *ib*

13. The *corpus delicti* is made up of two things: First. The fact that a human being has been killed; and

Secondly. The existence of criminal and human agency as to the cause of the death. *Per MASON, J.* *ib*

14. In proving the confessions of a prisoner, it is required that all the confessions be taken together, as well that which makes for the prisoner as that which makes against him; but it is not necessary to adopt the whole confession, where other evidence in the case proves part of the confession to be untrue. *Per MASON, J.* *ib*

15. Confessions of a prisoner are a doubtful species of evidence, and should be received with great caution. *Per MASON, J.* *ib*

16. No man can be convicted of criminal offence upon his own confession alone. That a crime has been committed, confessions are competent evidence in the case; but alone are not sufficient. *Per MASON, J.* *ib*

17. Charge of Judge Mason, on the trial at the circuit, of an indictment for murder. *ib*

See INTOXICATION.
EVIDENCE.
INDICTMENT.
WRIT OF ERROR.

N.

NATURALIZATION.

1. Under the act of congress, the county courts of the several counties of the State of New-York have jurisdiction of the naturalization of aliens. *Per BACON, J. The People v. Sweetman*, 858

2. State courts, in entertaining jurisdiction of cases of naturalization, act exclusively under the laws of the United States, and should be deemed, *quoad hoc*, courts of the United States. *ib*

3. Willful false swearing, by a person giving material testimony in a naturalization proceeding, before a county court, is an offence against the Laws of the United States, and

punishable in the United States courts and not in the state courts. *ib*

4. Application for naturalization must be made in open court, and evidence of residence, &c., must be taken by the oral examination of witnesses and not by previously prepared affidavits. *Per PRATT, J.* *ib*

NEW TRIAL.

1. Courts of Oyer and Terminer have power to grant new trials, in cases of conviction upon insufficient evidence, or where verdicts have been rendered against evidence; but the power ought not to be exercised except in cases where it was the duty of the court to advise the jury to acquit the defendant, or to inform them that it was unsafe to convict upon the evidence before them. *The People v. Goodrich,* 518
2. In cases of doubt, where the evidence is conflicting, and the credibility of the witnesses is in question, and no error has been committed by the court in its charge, a new trial will generally be denied. *ib*
3. The act of 1855 gives to the Supreme Court the power, on a writ of error, to grant a new trial where the verdict is against the weight of evidence. *Rogers v. The People,* 632

See WRIT OF ERROR.

P.

PERJURY.

1. Form of an indictment for perjury, alleged to have been committed in a proceeding to obtain the naturalization of an alien, in a county court. *The People v. Sweetman,* 358
2. Where a person testifies to what is true in fact, but at the time he testifies does not know it to be true, and has no knowledge on the subject, if such testimony be material and the act willfully committed, such person is guilty of perjury and may be convicted under an indictment in the ordinary form. *The People v. McKinney,* 510
3. Where, in an action on an alleged contract, in which the making of the contract was in issue, a witness testified that he went with the parties to the field where the contract was made, and was present at the making of the contract, and heard it agreed to by the parties, and that no other persons were present except himself and the parties to the contract, and it appeared on the trial of an indictment against such witness, for perjury in giving such evidence, that such witness did not go to the field where the contract was made, and was not present and had no knowledge of the transaction, it was held that such evidence was circumstantially material, and that the witness, having testified willfully, was guilty of perjury. *ib*
4. Form of an indictment for perjury, committed in a civil action tried before a justice of the peace. *ib*

PHYSICIAN.

See EVIDENCE.

PLACE OF TRIAL.

1. A *certiorari* to remove a cause from the Oyer and Terminer to the Supreme Court, before trial, may be issued on the application of the prosecution. *The People v. Baker,* 181
2. And where a cause so removed is pending in the Supreme Court, and it appears that a fair, impartial and effectual trial cannot be had in the county in which the indictment was found, the Supreme Court, at special term, will order the trial to be had in some other county. *ib*
3. Where the indictment is against several persons, and enough is shown on the part of the prosecution to make a change of the place of trial proper as to one defendant, the change will be made as to all the defendants, although it is a

case in which every defendant is entitled to a separate trial. *ib*

4. And where it appears, in opposition to such application, that the defendants' witnesses are poor and unable to bear the expenses of a journey to another county, and that the defendants also are destitute of property, the court may require, as a condition to changing the place of trial, that the district attorney procure some arrangement to be made by which the county, in which the indictment was found, shall pay the necessary expenses of the indigent witnesses subpoenaed in behalf of the defendants and attending at any court in which the trial shall not be postponed at their instance. *ib*

5. Ordinarily, where the place of trial is changed in a criminal case, an adjoining county should be selected; but if the necessity which requires the change calls for it, a more remote county may be designated. *ib*

6. Where an impartial jury cannot be obtained in the county in which the indictment is found, the place of trial can be changed only by removing the indictment into the Supreme Court by *certiorari*, and then moving the Supreme Court to change the place of trial to some other county. *The People v. Ruloff*, 401

See JURISDICTION.

PRACTICE.

1. Since, by the Revised Statutes, a defendant in a criminal case is allowed to make a bill of exceptions, as in civil cases, and have the exceptions examined upon a writ of error, the practice of suspending judgment, to enable the court below to take the opinion of the Supreme Court upon questions raised upon the trial, ought not to be encouraged. *The People v. Cummings*, 343
2. Where an indictment has been removed into the Supreme Court by *certiorari*, before trial, it must be tried at a Circuit Court, like other

issues pending in the Supreme Court, and not at the Oyer and Terminer. *The People v. Ruloff*, 401

See AFFIDAVIT.

PRECEPT.

JURY.

COMMITMENT.

RECORD OF CONVICTIONS.

CERTIORARI.

HABEAS CORPUS.

PRECEPT.

1. The statute requiring the district attorney to issue a precept to the Sheriff, at least twenty days before the holding of a holding of a court of Oyer and Terminer, if it is at all applicable to the stated terms of such courts held under the Code, is merely directory, and an omission to issue it, inasmuch as it does not "tend to the prejudice of the defendant," will not invalidate the subsequent proceedings or judgment. *McCann v. The People*, 272
2. It is no good cause of complaint, on the part of the defendant, that no precept was issued by the district attorney to the sheriff previous to the sitting of the Oyer and Terminer. Its omission, even if it is required to be issued, is not an irregularity of which anybody can take advantage. *Per HARRIS, J. The People v. Cummings*, 343
3. No such precept is now necessary for a regular Court of Oyer and Terminer. *Per GOULD, J.* *ib*
4. The case of *McGuire v. The People* (2 Park. Cr. R., 148) reviewed. *Per GOULD, J.* *ib*

PRODUCING PRETENDED HEIR.

1. What constitutes the offence of fraudulently producing an infant, falsely pretending it to have been born of parents whose child would be entitled to inherit property, with the intent of intercepting the estate, as described in 2 Revised Statutes (p. 676), discussed on deciding to admit a person accused of such felony to bail in the sum of \$5000. *The People v. Cunningham*, 520

Q.

QUARANTINE.

See BOARD OF HEALTH.

R.

RAILROADS.

1. Under the thirty-fifth section of the act of 1850, entitled "An act to authorise the formation of railroad corporations, and to regulate the same," a conductor of a train is protected against an indictment for assault and battery, for putting out of the cars a passenger who refuses to pay his fare, if he use no unnecessary force; and where a passenger has refused to pay his fare, and the train has been stopped for the purpose of putting him out of the cars, the right of the conductor to put him out is not taken away by his then offering to pay the fare. *The People v. Jilson*, 234
2. The relations and rights of a passenger, as regards the railroad company in whose cars he travels, discussed by MULLETT, J. 5b
3. On the trial of an indictment for an assault and battery, it appeared that the defendant was a conductor on a railroad, and that the act complained of was committed in forcibly ejecting a passenger from a car, before he had reached the station for which he had purchased his ticket; one ground of defence being that the passenger had conducted himself in a violent and disorderly manner, so as seriously to disquiet the other passengers; held that it was competent for the defendant to prove the passenger guilty of such misconduct during any part of his entire passage, it being a short one, and that it was erroneous to restrict the evidence to the last three miles of the passage. *The People v. Caryl*. 326
4. It is erroneous to charge that a conductor on a railroad has no authority to eject a passenger from the car for misconduct, except when it is such as to disturb the peace

and safety of the other passengers. Grossly profane or indecent language may be a sufficient ground for expulsion. 5b

5. It is not competent on such a trial to give evidence, on the part of the prosecution, of the general temperance and sobriety of the passenger ejected. His conduct on the passage is alone in question. 5b
6. Where, on the trial of such an indictment, it was one of the grounds of defence that the passenger improperly refused to surrender his ticket, when requested by the conductor to do so, it was held to be proper for the defendant to prove what was the regulation and custom of the company, as to the place of collecting tickets for the station to which the passenger was going. 5b
7. When the regulation of a railroad company, as to the place of collecting tickets from the passengers on a railroad, is a reasonable one, and a passenger refuses to comply with it, it is the right of the conductor to require the passenger to leave the cars, and, if he refuses to go, he may be ejected without unnecessary violence. 5b

RAPE.

1. The word "ravish" is necessary, in charging the offence, in an indictment for rape; and its omission in the indictment will, after conviction, be ground for reversal on error. *Gouglemann v. The People*, 16
2. On the trial of an indictment for rape, it is not competent, on the part of the defence, to prove acts of illicit sexual intercourse between the prosecutrix and persons other than the defendant, although the prosecutrix had previously been asked, on her cross-examination, in relation to such illicit acts, and had denied them. (This case overrules *The People v. Abbott*, 19 *Wend.*, 192.) *The People v. Jackson*, 391
3. Form of an indictment for rape. 5b

RECEIVING STOLEN GOODS.

1. Form of an indictment for feloniously receiving and having stolen property, with counts charging some of the defendants as accessories. *Wills et al. v. The People*, 473
2. On the trial of an indictment for feloniously receiving and having stolen goods, where a witness called by the prosecution had testified that he called on the defendants and found the stolen property in their possession, and purchased it of them for a much less sum than its value, and had, at the time, in his possession, a memorandum of the goods which had been stolen, it is competent for the prosecution, for the purpose of showing the true position of the witness in the transaction, to show by him that he had previously received the memorandum from the person from whom the property had been stolen, and that he also got the money with which he bought the property from the person from whom it had been stolen. *ib*
3. What facts and circumstances are sufficient to justify the court in refusing to discharge one of the defendants, on the trial of such an indictment, where a clear case of guilt was made out against the other defendant, both being claimed to have acted in concert, stated in the history of the case, and commented on by MITCHELL, J. *ib*
4. Where the bulk of the stolen goods was found, in Williamsburgh, in a house apparently kept for storing and concealing goods, but a portion of the goods, used as samples, was found at the store and place of business of the defendants in New-York, at which place Wills, one of the defendants, exhibited to a witness, and offered to sell him, the whole of the goods, and the samples, before they were exhibited to the witness, were brought in by Conley, another defendant, after an absence of only fifteen minutes from the time he was sent by Wills to get them; it was held, on the trial of an indictment found in the city of New-York, that the Court of General Sessions were right in overruling a motion to dismiss the case,

or to direct the jury to acquit the prisoners, which motion was made on the ground that it was not shown that they had received or had the goods in question, within the city and county of New-York. *ib*

5. On the trial of an indictment for receiving stolen goods, knowing them to be stolen, it is not competent for the defendant, for the purpose of proving that when he received the goods he had no knowledge of their being stolen, to prove what the person from whom he received the goods said as to the manner in which such person became possessed of the property. *ib*
6. Where a witness, called by the defendants, testified that he saw in the store of the defendants samples of the property alleged to have been stolen, it is not competent for the defendants to prove by the witness what was said by one of the defendants then present "as to what the property was doing there." *ib*
7. Under the statute of this state, a person may be tried and convicted of the offence of feloniously receiving and having stolen goods, either in the county where the prisoner originally received the stolen property or in any county in which he afterwards had it. *ib*

RECOGNIZANCE.

1. Form of a recognizance, taken by a police justice, to appear and answer to an indictment, in the Court of General Sessions, and of a justification by the surety in the recognizance. *The People v. Bogart*, 143
2. Form of a recognizance, taken by a police justice, on a charge made before him of grand larceny. *ib*

See BAIL.

RECORD OF CONVICTION.

1. Form of a record of conviction for felony, where the defendant was tried on an indictment found against him jointly with another

person, and to which the defendant pleaded not guilty and demanded a separate trial. *Peeverly v. The People*, 59

See COMMITMENT.

ROBBERY.

1. In an indictment for robbery in the first degree (2 R. S., 677, § 55), the defendant was charged with having feloniously assaulted J. D., on, &c., at, &c., and then and there feloniously putting him in fear and danger of his life, and then and there feloniously and violently stealing, taking and carrying away from his person and against his will, certain money of the said J. D., to wit, current bank bills of the value of \$15, and silver coin of the value of \$3, of the goods and chattels of the said J. D., against, &c., and it was held sufficient, without setting forth the number and denomination of the bank bills, and the amount secured thereby and remaining unsatisfied thereon, or the number and description of the pieces of silver coin, *The People v Loop*, 559

S.

SEARCH WARRANT.

1. At common law, all warrants in criminal proceedings are required to be under the hand and seal of the magistrate who issued them. Certain statutory exceptions stated by ROSEKRANS, J. *People v. Holcomb*, 656
2. A search warrant, not under seal, is void, and affords no protection to an officer attempting to execute it. *ib*
3. Nor can a search warrant be sustained as valid when directed to "any constable" of the county in which the search is directed to be made, the statute requiring all search warrants to be directed "to the sheriff of the county, or to any constable or marshal of the town or city" in which the stolen property is alleged to be secreted. *ib*

4. The place to be searched must be particularly designated in the search warrant. Where a part of the complaint was recited in the warrant, in which it was stated that the complainant suspected the stolen property was concealed in the stable of C. P., on the east side of the canal, in the village of Whitehall, in said county, known as the "red barn," and then the warrant gave direction to search the places where said property was suspected to be concealed, it was held insufficient, for the reason that though the place mentioned in the complaint was sufficiently designated, the direction given in the warrant was too general, and authorized the search of any suspected place, instead of confining the search to the place so suspected by the complainant. *ib*
5. Whether a search warrant can be executed, or afford protection to an officer, where it shows upon its face that the party who has the property alleged to be stolen is charged with the larceny of it, and no warrant for his arrest accompanies, or is incorporated in the search warrant, *quere?* *ib*

SELLING UNWHOLESOME FOOD.

1. Where an indictment for selling unwholesome beef charged that the defendant sold the beef in question to divers citizens "as good and wholesome beef and food," it was held to be a sufficient averment that it was sold to such citizens, to be eaten by them. MASON, J., dissenting. *Goodrich v. The People*, 622
2. And it is no defect in such an indictment that the persons are not named to whom the beef was sold, if it is alleged in the indictment that such persons were "to the jurors unknown." *ib*
3. Nor is it necessary to allege in such an indictment that the defendant intended to injure the health of the persons who ate the beef, or that it did injure their health. *ib*
4. What is a sufficient averment of time and place in such an indictment. *ib*

5. To sustain an indictment for this offence, against a person who had owned a diseased cow and had slaughtered her and sold her for food, it is enough to prove that the disease was known to the defendant and that the nature and tendency of the disease was such as to taint and affect the flesh of the entire animal so as to make it unwholesome in any degree, although the taint was imperceptible to the senses, and although the eating of the flesh produced no apparent injury to those who ate it. 3b

6. On the trial of such an indictment it is competent to prove what was said to the defendant before he sold the beef, by a third person, on the subject of the unwholesomeness of the beef for food, though no response was made by the defendant, such evidence being proper on the question whether the defendant knew or believed that the meat was bad when he disposed of it. 3b

7. It is proper on such a trial to prove by physicians that the eating of diseased and unwholesome meats does not always cause apparent sickness, and also for physicians to give their opinion of the nature of the disease of which the cow died, founded on the descriptions which other witnesses had given of the ulcerated condition of the animal and also to state whether, in their opinion the disease would cause fever, and whether the flesh of animals laboring under a fever is unwholesome for food. 3b

SPECIAL SESSIONS.

See DISORDERLY PERSONS.
EVIDENCE.

STRONG AND SPIRITUOUS LIQUORS.

1. The word "beer," in its ordinary sense, denotes a beverage which is intoxicating, and is within the meaning of the words "strong and spirituous liquors," as used in the Revised Statutes. *The People v. Wheelock*, 9

2. Where the indictment charged the sale of "strong and spirituous liquors," without license, and, among other liquors, "one pint of strong beer," and the proof, without further explanation, was, that the defendant sold "Dutch beer," it was held that the variance was immaterial. 3b

See INTOXICATION.
EXCISE LAW.

T.

TRIAL.

1. The trial of a criminal case will be postponed on application of the defendant, on the general affidavit of the absence of material witnesses, unless it is apparent that the application is made merely for the purpose of delay; in which case an affidavit will be required showing the nature of the defence intended to be sustained by the absent witnesses, that the court may judge of their materiality. *The People v. Wilson*, 199

2. Where an application was made to postpone the trial of an indictment for murder, and it was claimed by the district attorney, and was not controverted by the defence, that no living person except the prisoner was present at the alleged murder, and there was no pretence of an *alibi*, such general affidavit was held to be insufficient, and the prisoner was required to disclose what defence he expected to establish by the evidence of the absent witnesses. 3b

3. Trials in criminal cases will not usually be postponed on account of the absence of witnesses to character. 3b

4. Where an application was made to postpone the trial of an indictment for murder, to enable the defendant to procure witnesses to character, and the district attorney, in opposing the motion, offered to admit the previously good general character of the prisoner, the motion was denied on the making of such admission. 3b

TRIAL BY JURY.

1. The act of April 2, 1850, regulating the police of the town of Watervliet, so far as it takes away from a person charged with an offence the right to give bail for his appearance at the next criminal court having jurisdiction, is an infringement of the right of trial by jury, and is unconstitutional and void. *The People v. Carroll*, 22

See JURY, PETIT.
DISORDERLY PERSON.

V.

VENUE.

See PLACE OF TRIAL.

VERDICT.

1. The court has a right to direct a jury to reconsider their verdict before it has been recorded, and it is its duty to do so, if satisfied there has been a palpable mistake. *The People v. Bush*, 552

W.

WITNESS.

1. It seems that justices of the peace, in examinations upon complaints made before them in criminal cases, have no power to commit persons for refusing to be sworn as witnesses. *The People v. Webster*, 503
2. Persons believing in any other than the Christian religion are required by statute (2 R. S., 408) to be sworn according to the peculiar ceremonies of their religion. *The People v. Jackson*, 590
3. A Jew, or Israelite, is usually sworn upon the Hebrew bible, and with his head covered. *ib*

WRIT OF ERROR.

1. Form of a writ of error to remove a cause, after judgment, from the

Court of General Sessions of New-York to the Supreme Court; of the allowance thereof, and of the return thereto. *Feverly v. The People*, 59

2. The Revised Statutes have abolished all assignments of error, and allegations of diminution on writs of error and *certiorari*, in criminal cases. *Hayes v. The People*, 175

3. In deciding a criminal case, therefore, brought up on a writ of error, the Supreme Court cannot look beyond the record of judgment. *ib*

4. To enable a party to avail himself of any irregularity in the court below, it should be presented in the first instance, in that court, either by plea in abatement or bill of exceptions, so as to introduce it upon the record, and thus subject it to review upon writ of error after judgment. *ib*

5. Where the return to a writ of error contained only the indictment and the clerk's minutes of the trial, showing the impanneling of the jury, the verdict of guilty and the sentence of the court, without any judgment record, it was held that the questions could not be raised, whether the defendant was present at the trial, or whether he was asked, previous to the passing of the sentence, if he had anything to say why sentence should not be pronounced against him, *Thompson v. The People*, 208

6. Whether such objections would have been available if the record had been before the court, *quere. ib*

7. Form of a writ of error, sued out in behalf of the people, to remove a criminal case from the Supreme Court to the Court of Appeals. *The People v. Thoms*, 256

8. Since the adoption of the Revised Statutes, a party who has brought a writ of error to reverse a judgment in a criminal case cannot allege diminution and sue out a *certiorari*, but the cause must be decided upon the return to the writ of error, which return properly includes the pleadings, the bill of exceptions, if any, and the judg-

- ment; and when, on alleging diminution, a *certiorari* had been issued and return thereto had been made, the *certiorari* and return were struck out on motion. *McCann v. The People*, 272
9. Any irregularity, which cannot be made to appear in the return to the writ of error, can be made available on motion, in the court below, either to quash the indictment, or for a new trial or for other appropriate relief, according to the circumstances of the case. *ib*
10. Thus, if an error or irregularity has occurred in summoning or impanneling the petit jury, unless the defendant can present the objection in the form of an exception to some decision upon the trial, he must bring it before the court on a motion for a new trial. He cannot make it the ground of reversing the judgment upon writ of error. *ib*
11. Where the presiding judge had charged the jury that the defence of insanity must be proved beyond a reasonable doubt, and if the defendant had satisfied them beyond a reasonable doubt, so that they should find that at the time of killing he was so far really insane as not to be responsible for the act, they should acquit him, but otherwise they must convict him, the charge was held not to be erroneous. *ib*
12. Section three of chapter three hundred and thirty-seven of the laws of 1855, which authorizes an appellate court, on a writ of error from a court of Oyer and Terminer, to order a new trial, if it shall be satisfied that the verdict was against evidence, or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below, is inoperative and void, for the reason that it is in conflict with the sixteenth section of the third article of the constitution of this state, which declares that no local bill shall embrace more than one subject, and that that shall be expressed in the title. *ib*
13. It is the duty of the officer to whom an application is made for an allowance of a writ of error and a stay of execution in a capital case, to deny the same if he is satisfied of the legality of the conviction. *The People v. Wood*, 681
- See PRECEPT.
NEW TRIAL.

END OF VOLUME THREE.

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